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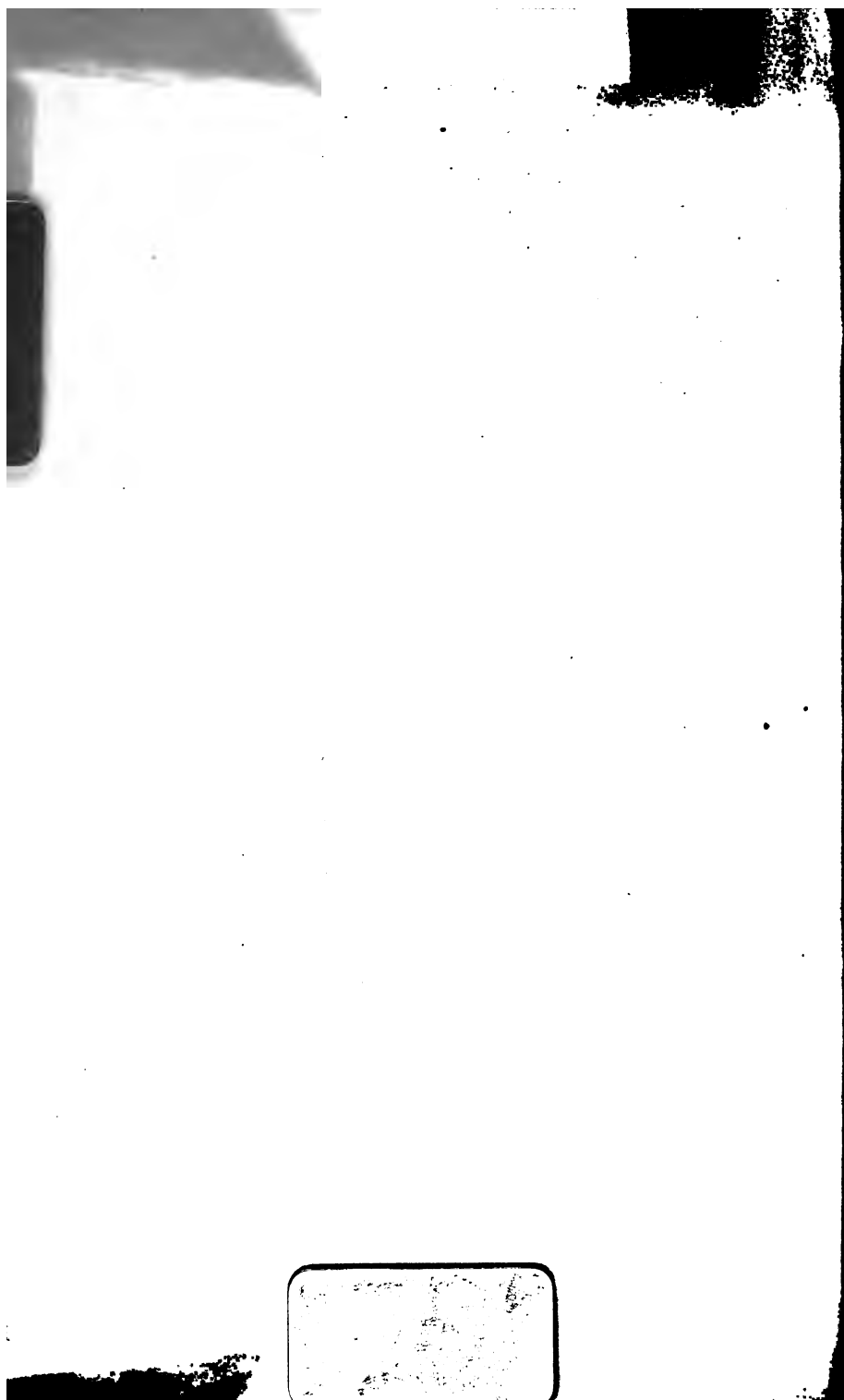
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JSN  
LPE  
VRC  
V. 2





The first part of the paper discusses the importance of the study of the history of the United States. It is argued that the study of the history of the United States is essential for a full understanding of the country and its people. The second part of the paper discusses the importance of the study of the history of the United States. It is argued that the study of the history of the United States is essential for a full understanding of the country and its people.



*Sandys*

**CASES**  
**OF**  
**CONTROVERTED ELECTIONS,**  
**IN THE**  
**SECOND PARLIAMENT**  
**OF**  
**THE UNITED KINGDOM:**

BEGUN AND HOLDEN 31 AUG. 1802 :

DISSOLVED 24 OCT. 1806.

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By **ROBERT HENRY PECKWELL,**  
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

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**VOL. II.**

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1806.

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**JUL 15 1901**

# P R E F A C E

TO

## THE SECOND VOLUME.

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**T**HIS second volume is now submitted to the public, containing a Report of the Cases of Controverted Elections referred to select committees of the House of Commons, during the second, third, and fourth Sessions of the late Parliament; all the cases that were tried during the first Session, having been reported in the former volume. Without at all adverting to the merits or to the demerits of this work, it may safely be asserted, that in no former Parliament have points of higher importance arisen, or been discussed with more learning and ability, or determined with greater consideration, wisdom, and integrity. The author, therefore, considers it as no small advantage to himself, that it has fallen to his lot to communicate the knowledge, and perpetuate the memory, of these trials: but since, if these reports should not be found, in the event, to be of great utility, it can be imputed to nothing but to his imperfect use of such excellent materials; he feels

## P R E F A C E.

considerable anxiety in the publication of a work, the success of which may be attributed to so many causes, but its failure, to one only.

It is necessary to inform the reader, that the speedy publication of the concluding part of this work was rendered necessary by the dissolution of the Parliament, which took place October 24, 1806: and that in consequence of this, many authorities which were meant to be introduced as notes to the later cases, have been unavoidably omitted. It was the intention of the author, by those means, and by enlarging the index into a digest of adjudged cases, to have collected into these volumes, most, or all of the decisions of the House of Commons, and of select committees, upon questions of election law. Since the completion of this design has become impossible, he has finally resolved upon the execution of another plan, namely, of publishing these and other materials which he has collected during the course of his labors, in the form of a treatise upon this branch of the law, and upon the nature, qualities, and species of the elective franchise.

He deems it incumbent upon him to make his acknowledgments to Mr. Davies, of Leominster, for having favored him with the note of the case of Leominster, 1796, subjoined in the appendix to this volume; and to Mr. Estcourt, of Lincoln's Inn, for the use of the minutes of evidence and the speeches of counsel in the cases of Malmesbury, 1796, and 1797, from which he has been enabled to form a report of those cases: and he feels a peculiar pleasure, at the conclusion of this work, publicly to  
testify

## P R E F A C E.

v

testify his gratitude, and infinite obligations, for the assistance which he has derived throughout the whole progress, both of the composition and publication of it, from the active friendship, the able judgment, the profound learning, and accurate discernment of Mr. Hobhouse of the Middle Temple.

It remains only to add a few remarks, arising either from some elections and returns to the late Parliament, which were not the subjects of a petition, or from petitions presented, but not referred to select committees, and which therefore could not find a place in the body of this work \*.

Dec. 31, 1806.

\* 30 Nov. 1803. The House was informed, that the petitions, presented in the former Session, complaining of undue elections for the boroughs of Kingston-upon-Hull, Leominster, Shaftesbury, and Boston, had not been renewed in this Session. Petitions not renewed.

23 Nov. 1803. An order for considering a petition against an election for the borough of Great Grimsby, (presented, Aug. 1, 1803,) was discharged, the petitioners not having entered into their recognizances. The Parliament met 22 Nov. The former Session had been put an end to by prorogation, 12 Aug. Great Grimsby, 1803. Petition discharged for want of recognizance.

23 Nov. 1803. A petition from Mr. Ogle, had been presented, 27 May, complaining of Mr. Fyde's election for the borough of Boston, in which Mr. F's qualification was questioned. The House being informed, that Mr. F. was abroad at the time when the petition was presented, and that he did not return till the beginning of November, when he was for the first time informed of the contents of the petition, and therefore could not comply with the order of the House, 21 Nov. 1717: and the entry in the Journals of the proceeding in the case of Westbury, 1747, having been read; it was ordered that Mr. F. should be allowed seven days more, for delivering in his qualification. See *supra*. Boston, 1803. Time allowed for S. M. to deliver in his qualification.

Chippen-  
ham, 1804.  
Petition of  
appeal aban-  
doned.

26 Mar. 1804. A petition was presented from certain inhabitants of Chippenham, paying or liable to pay scot and lot there, praying to be permitted to oppose the right of election reported to the House by the select committee, 28 Mar. 1803. A petition was presented, 13 Apr. by other persons, praying to be permitted to defend the said right: these petitions were taken into consideration, 18 May: on which day, no counsel, or agent, or party, appearing on the part of the first petitioners, the orders for taking the said petitions into consideration, were discharged.

Catherlogh,  
1806. Re-  
turn amend-  
ed where the  
christian  
name of the  
member was  
mistaken:  
and leave  
given to  
petition.

9 July 1806. The return for Catherlogh, of Michael Symes, Esq. was amended, by inserting the name of Michael therein instead of Arthur. The returning officer attended at the bar of the House, and stated that the word 'Arthur' had been inserted by mistake. Leave was given to petition against the election, or return of Mr. Symes, within fourteen days. A precedent was read from the Journal 26 May, 1802, where the name of Evan Law, had been inserted in the return for Newtown, by a mistake instead of Ewan. And see Sutherlandshire, 15 Dec. 1790.

Petition dis-  
charged for  
want of re-  
cognizance.

3 July, 1806. A petition from Mr. Davies presented, 18 June, complaining of the election of Mr. Colclough, for the county of Wexford, in Ireland, was discharged, the petitioner not having entered into his recognizance.



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- In Vol. I. xiv. line 11. *for 436, read 439.*  
                   — 21. *for Cale, read Borough.*  
 xviii. — 24. *for c. 25. read c. 52.*  
 xxiv. — 33. *for c. 84. read c. 52.*  
 xxviii. — note <sup>b</sup> *for 55, read 35.*  
 xxix. — 4. *for 7th. read 27th.*  
 xxxix. — 25. *for Jan. read Jun.*  
                   23. — 26. *for 24, read 26.*  
                   56. — 33. *for in operation, read inoperative.*  
 194. — 12. *for 1775, read 1776.*  
 246. — 15. *for money, read many.*  
 291. — 16. *for 5 Burr. read 4 Burr.*  
 306. — 16. *for eight, read twelve.*  
 327. — 13. *for attends, read attend.*  
 376. note <sup>a</sup> line 9. *for sitting member, read petitioner.*  
                   line 15. *for the same sitting member, read the same person*  
   *returned upon the second election.*  
 407. — 22. *after 34 G. 3. add c. ~~70~~ 73*  
 428. — 29. *for 32 G. 3 c. 72. read 34 G. 3. c. 73.*  
 429. — 36. *for an, read on.*  
 452. — 26. *for statutory, read statutory.*  
 500. — 23. *for re-elected, read elected.*  
 Vol. II. 27. — 37. *for 3d, read 9th.*  
                   52. — 1. *for IV. read III.*  
                   70. — 19. *for necessary, read necessary.*  
                   78. — 23. *for 60, read 62.*  
                   87. — *Dele 3 last lines of note r.*  
                   148. — 3. *margin. for of, read and.*  
                   171. — 26. *for it, read in,*  
                   181. — 21. *for 1775, read, 1776.*  
                   226. — 12. *after freeholder, add, of an entire tenement.*  
                                   31. *for case, read case.*  
                   230. — 25. *for as, read an.*  
                                   30. *for Scaber, read Seaber.*  
                   252. note <sup>c</sup>. *add, See 19 Jour. 565. Indexes to Journals,*  
   *Tit. Prisoners.*

# REPORTS OF CASES

## OF

### CONTROVERTED ELECTIONS.

#### CASE XXXII.

#### THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 3d of February, 1804, and consisted of the following Members :

Vice. Marham, *Chairman*.  
 Sir Watkin Williams Wynn, Bart.  
 Peter Will. Baker, Esq.  
 Hon. Montgomerie J. G. Stewart.  
 Cha. Cockerell, Esq.  
 Rob. Sharpe Ainslie, Esq.  
 Cha. Stewart Hawthorne, Esq.  
 John Atkins Wright, Esq.  
 Sir David Carnegie, Bart.

Hon. Edw. Spencer Cowper.  
 Lord John Thynne.  
 John Benn Walth, Esq.  
 Hon. Newton Fellowes.  
 Isaac Hawkins Browne, Esq. *Nominee*  
*for the Petitioner.*  
 Nicholson Calvert, Esq. *appointed by*  
*the first 13. \**

*Petitioners* : 1. William Mainwaring, Esq. 2. Electors,  
*Sitting Member* : Sir Francis Burdett, Bart.

*Counsel for Mr. Mainwaring* :

Mr. Piggott. Mr. Serjeant Lens. Mr. Courthope.  
*for the Electors* : Mr. Garrow.  
*for the Sitting Member* :

Mr. Plumer. Mr. C. Warren. Mr. Clifford.  
*for the Sheriff* : Mr. Adam.

THE petition of Mr. Mainwaring<sup>a</sup> stated the candidates at the last election to have been, the petitioner, Sir Francis Burdett, Bart. and George Byng, Esq. ; that Sir

*Petition of*  
*Mr. Main-*  
*waring.*

<sup>a</sup> Excused 7th July, on account of the death of a near relation.

<sup>b</sup> Excused 14th March, on account of indisposition.

<sup>c</sup> Excused 28th February, on account of the death of a near relation.

<sup>d</sup> The sitting member having waived his right to appoint a nominee. See St. 18 G. 3. c. 42. s. 6.; and St. 28 G. 3. c. 52. s. 15.

<sup>e</sup> Presented 6th December, 1802 ; renewed 23d November, 1803.

William Rawlins, Knt. and Robert Albion Cox, Esq. the sheriff of the county, and returning officer, manifested great partiality in favour of Sir F. B., admitting many persons to vote for him who had neither colour nor pretence to vote, refusing to examine them, or to suffer them to be examined, respecting their right; and rejecting the votes of several persons who tendered themselves in favour of the petitioner: that the undue conduct of the said sheriff during the said election was highly injurious to the petitioner, and to the rights of the real electors of the said county; that the sitting member had been guilty of bribery; and that, by these several means, he had obtained a colourable majority over the petitioner; and that "by the partiality and undue conduct of the said sheriff, acting as such sheriff and returning officer for the said county of Middlesex," he had procured himself to be returned: whereas the petitioner had the legal majority, and ought to have been returned.

Petition of electors.

The petition of "the freeholders of the county of Middlesex" charged the sitting member, Sir F. Burdett, with bribery, and treating.

Opening.

On the 4th of February, Mr. Piggott made a general opening of the case of Mr. Mainwaring, the petitioner. It consisted, 1. Of a charge against the sheriff<sup>s</sup>, of gross misconduct, and partiality: 2. A claim to the majority of votes, founded upon objections of various sorts, made to no less than 2196 votes for the sitting member: 3. Bribery. After which 21 poll books were put in by the clerk to the clerk of the peace for the county of Middlesex, who deposed that he had received them from the sheriffs, and that they had been in his custody ever since. The numbers were for Mr. Byng 3848; Sir Francis Burdett 3207: Mr. Mainwaring 2936: Majority of Sir F. B. over Mr. M. 271. The poll lasted during fifteen days, beginning July 13, 1802.

Poll-books.

Arrangement of the petitioner's case.

On the next day, Mr. Piggott proposed to offer his evidence conformably to the following arrangement of his

<sup>s</sup> Presented 7th December, 1802; renewed 23d November, 1803.

<sup>s</sup> As it is more agreeable to the common use of words, to make use of the plural number when speaking of two

persons, the word *sheriffs* will be used in future. The reader will nevertheless remember, that the two sheriffs of London constitute one officer in the county of Middlesex.

case : 1. As to the misconduct of the sheriffs : 2. As to 372 voters who had named as their freehold a share in the Good-intent mill, and who were said in fact to have voted for a small parcel of land in Isleworth upon which a mill called the Good-intent mill was intended to be built ; and whose votes were, as he contended, notoriously bad, and were received in such circumstances as to attach the greatest blame upon the returning officer : he submitted, that should this class of votes be proved to be bad, the majority being turned in favour of his client, the committee would then call for an answer to that part of the case from the other side. 3. He proposed, if necessary, to disqualify a large number of voters who were not properly assessed to the land tax ; and, if a sufficient majority should not be established by those means, in the next place to have recourse to other heads of objection : 4. If he failed in proving that his client was entitled to the seat, he proposed to prove the charge of bribery against the sitting member. And he observed that there would still remain the petition of the freeholders to be tried, which contained an allegation of treating ; and which might be entered upon, if the event of the trial of the present petition should render it necessary to resort to that charge. The counsel for the sitting member objected to this plan ; insisting, first, that it was incumbent on the petitioner to lay his whole case before the committee, before their client was called upon to answer any part of it : secondly, that as the petitioning freeholders were evidently in the interest of the petitioning candidate, their case, according to the general practice, ought to have been opened at the same time with his : and that the committee would not permit petitioners, by availing themselves of this formal distinction, to multiply cases, and parties, before them : lastly, they proposed to shew that the petitioning freeholders had no right to be heard before the committee, their petition not being such as could be proceeded upon, according to law <sup>a</sup>. After some discussion it was agreed, that the question as to dividing the case should be deferred till the

Objected to  
by the sit-  
ting mem-  
ber.

<sup>a</sup> See case of Caermarthenshire, Note (A) vol. i. p. 294.

evidence against the sheriffs was gone through; that Mr. Mainwaring should prove his majority of votes, before he offered any evidence of bribery against Sir F. Burdett: and that all the questions respecting the petition of the freeholders should be reserved, without prejudice to the petitioners, till it should appear, from the course of the present trial, whether or not it would be necessary to discuss it.

Evidence of  
sheriffs'  
misconduct.

The first witness, Mr. John Adolphus, called on the part of the petitioner, began his evidence by giving an account of some tumultuous proceedings which had taken place during the poll, and of certain scandalous and indecent exhibitions, and insulting speeches directed against Mr. Mainwaring, which had been permitted by the sheriffs, in their presence, and in the front of the hustings.

Objection  
to evidence  
of facts not  
alleged in  
the petition.

Mr. Adam, as counsel for the sheriffs, upon Mr. Piggott's stating these facts in the opening of his case, had declared his intention to resist the right of the petitioner to prove them as a part of the charge against his clients, inasmuch as they had not been stated in the petition: and he now contended, that it contained no allegation under which this evidence could be introduced; that as in all courts of justice, trials must proceed *secundum allegata & probata*, so most especially in this, where not only by the oath of the members of the committee, but by the very frame and constitution of their jurisdiction, their powers were limited by the terms of the petition, and extended no further than to the matters contained therein: that, indeed, the petitioner had complained of the "undue conduct of the sheriff," as injurious to him; but that from the antecedent part of his petition, it plainly appeared that these words were only referable to the improper admission, and rejection of votes; and that nothing was charged respecting any violence which had been suffered to be committed at the hustings, or respecting any personal insults offered to the petitioner, which the sheriffs had connived at, or which they had neglected to suppress: he adverted to the case of Nottingham<sup>1</sup>, where the criminal conduct of the returning officer being the sub-

<sup>1</sup> Ante, vol. i. p. 77.

ject of the petitioner's complaint, had been distinctly stated in his petition; and to the case of Oxfordshire, 1754<sup>k</sup>, where the petitioners, Lord Wenman and Sir J. Dashwood, specifically alleged the particular grounds upon which they demanded a censure upon the sheriff. It was answered by the counsel for the petitioner, that according to the form of petitions universally adopted, and by the law and custom of parliament, it had always been held, that a general allegation of misconduct let in the proof of particular instances; that it was merely sufficient to state the charge; but it was not necessary to specify the evidence, or the particulars facts intended to be proved, in order to establish that charge; it was needless to cite instances<sup>l</sup>, where particular acts of corruption had been given in evidence under the general allegation of bribery, or treating; or where specific instances of the misconduct of returning officers had been proved, although their partiality had been stated in the most general terms. In the cases cited on the other side, perhaps more precision had been used by the petitioners than was necessary: but there was a distinction between them and the present; for in one of them, the petition was not directed against the conduct of the sheriff during the election, but against his conduct afterwards: and in the other, the misconduct of the returning officer was complained of, not as having deprived the petitioner of the majority of votes, but as having deprived him of his election and return without opposition: or, secondly, as the ground of a void election: whereas here, the petitioner complained that the sitting member had obtained a colourable majority of votes by means of the partiality and undue conduct of the sheriffs. Nothing, therefore, could be said to fall more properly within the terms of the petition, than the evidence now offered, tending to shew by what acts, and by what criminal supineness and neglect, their partiality was manifested.

The committee decided, that the examination should proceed.

<sup>k</sup> 27 Jour. 17, 18.

<sup>l</sup> See the case of Cricklade, 2 Lud. 323.

Evidence  
against the  
sheriffs.

Hereupon Mr. Adolphus continued his narration, and was followed by several other witnesses, who described the manner in which the election had been conducted.

This evidence is omitted here; since it would be tedious to give it in detail; and, on the other hand, it would be a delicate and invidious task to attempt any general account of transactions, in which the character and honour of several individuals were deeply concerned, and brought in question. The minutes of the committee, relating to this part of the case, were afterwards printed by order of the House.

The report of the committee upon the conduct of the sheriffs will therefore be presented to the reader, as containing a sufficient outline of their case to enable him to understand as well the nature of the charge proved against them, as the ground of their defence; although (as he will observe) the committee were of opinion, not only that their defence was insufficient, but that the foundation of it totally failed, inasmuch as their conduct had not been consistent with their own principles.

Discussion  
of further  
course of  
proceeding.

The evidence against the sheriffs occupied the time of the committee from Feb. 6 to Feb. 15: the absence of Mr. Walsh, one of their members, prevented their sitting on the 9th. On the 14th, this part of the petitioner's case being closed, and Mr. Piggott having given evidence to disqualify the 372 persons called Mill-voters, whose case will be related in the sequel, proposed, that the committee should call upon the sheriffs for an answer to what had already been proved; and then, should either report the petitioner entitled to the return<sup>m</sup>, or should call upon the sitting member to remove, if he could; the majority now obtained over him.

This

<sup>m</sup> It is proper here to mention, that the following requisition was proved to have been delivered on the part of the petitioner, to the sheriffs, at the election, on the fifteenth day:—"The sheriffs being sworn to return, as knights to represent the county of Middlesex in Parliament, such persons as shall to the best of their judgments appear to them to have the majority of legal votes; and

it being within their own knowledge, from the testimony of many of a certain class of persons claiming to vote in right of a mill, called in the poll-books, the Good-intent, and situate at Isleworth, that the persons who have polled in right of the said mill had not even the semblance of such franchise; it is therefore confidently expected, and I demand in my own name, and in the name



This proposal was strongly resisted on the part of the sitting member; and the question, Whether or not the case should be so divided, was argued on the 15th of February, by two counsel on each side. It was agreed that, for the purpose of the argument, the 372 mill-voters should be taken not to be duly affected to the land-tax. The counsel for the petitioner insisted upon a separate decision upon the case as it now stood, and reasoned from the justice and the convenience of such a mode of proceeding; and from the particular nature of the case. They said, that they had already proved the sheriffs to have been guilty of great misconduct; and, among other instances of breach of duty, to have received the votes of 372 persons, all in similar circumstances, and constituting a distinct class of pretended voters, whom they well knew not to have the least colour or pretext for claiming a right to vote: that in the admission of these persons consisted the most serious injury which the petitioner had sustained, and the most prominent part of the fraud and guilt of the sheriffs; but that fraud would become successful, and that injury much aggravated, if no redress could be obtained, till a very long and expensive scrutiny had been gone through. It was suggested, that if the committee were of opinion that the petitioner had been prevented from obtaining his return by a shameful conspiracy, to the success of which the returning officers had lent themselves and their whole authority, they would in the first instance restore him to that situation of which he had been thus deprived, and give him the seat immediately; leaving it to Sir F. Burdett to petition, if he thought fit. But if they were unwilling to grant this, at least they would call for an

Question on  
dividing  
the case.

Argument  
for the di-  
vision.

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name of the freeholders of the county of Middlesex, that the sheriffs will act consistently with the oath they have taken, and not add the persons who have polled as pretended owners of the said mill, to the number of real freeholders polled in the course of this present election, and thereby deprive the real freeholders of one of their most

invaluable privileges, but that the sheriffs will return such persons as knights to serve in Parliament for the county of Middlesex as shall appear by the poll-books to have a majority of legal votes, independently of the fictitious votes polled in right of the said mill."

answer to the case as it stood at present, since, upon the evidence already offered, it appeared that the petitioner had proved his right to have been returned: that this would produce no inconvenience to any of the parties, but on the contrary, might save a great deal of trouble, litigation, expence, and loss of time. That it was particularly the interest of the sheriffs to have their case disposed of without delay: if they should prove innocent, it was best that their innocence should be speedily declared: but in any event, it would be much to their advantage to be relieved, by the decision of the committee, from their further attendance at a trial, in a great part of which they might have no concern. They further submitted, that the measure proposed, was justified by the common practice of committees, who frequently decide separately upon the separate points of a case, where it appears that such a course will conduce to the attainment of justice, the expedition of the trial, or the convenience of the parties<sup>a</sup>. It was admitted that the committees, who first sat after the passing of the Grenville act, used most frequently to hear the whole of the case before they came to a determination upon any part of it; but it was said, that time and experience having contributed no less to the improvement of this judicature, than the statutes which had been at various times passed for that purpose, committees had learnt from the conveniency of the practice, to proceed by steps, and not to embarrass themselves by a confused view of many different questions submitted to them at the same time. The cases cited were those of Bedfordshire, 1785<sup>o</sup>, where the committee resolved to discuss the cases of each hundred separately, notwithstanding the opposition of the sitting member; the case of Cricklade, 1785<sup>p</sup>, where the case of the petitioner had been split so as to suit the nature of it; of Cirencester, 1792<sup>q</sup>, where the counsel on one side had been obliged, against their will, to argue certain general questions; of Great Grimsby in the last session, where, contrary to his earnest remonstrance<sup>r</sup>, the committee directed Mr. Plumer

<sup>a</sup> See 2 Lud. 336.

<sup>o</sup> 2 Lud. 381. 386. 388.

<sup>p</sup> 2 Lud. 350.

<sup>q</sup> *Quare*. See 2 Fra. 448.

<sup>r</sup> Ante, p. 64. This was a mistake. Mr. Plumer resisted at first, but afterwards

Plumer to argue an abstract proposition; and the case of Chippenham, in the same session\*, where the same course was pursued. It was difficult to draw any analogy between these proceedings and those of the courts of common law, since here, the petitioner might include any number of different complaints in his petition; there, the plaintiff must bring different actions: but it was said that even in courts of law, where a number of different issues were made upon the pleadings, it was by no means unusual for the judge to ask the opinion of the jury upon each separately.

On the part of the sitting member, the suggestion, that the committee would return the petitioner as duly elected, upon the evidence as it stood at present, was treated as extraordinary and absurd; since it was the sworn duty of the committee to hear the whole of the case: and since it was unquestionably competent to the sitting member, either to destroy the majority apparently obtained by his antagonist, or to shew, that he was personally disqualified to sit. That moreover, the constant practice in all courts of justice, was first to hear the whole case of the plaintiff throughout, unless a different plan was adopted for the convenience of the parties, and by their mutual agreement. That to divide this case, would be to introduce infinite perplexity and inconvenience. It was denied, that these 372 persons constituted a distinct class: because admitting them to be bad votes, by reason of having no freehold, or by reason of their not having been duly assessed to the land-tax, all persons standing in the same situation belonged to that class. But admitting them to constitute a separate class; could it be contended, that to discuss each class separately would save time? On the contrary, it was evident that the separation of the classes must necessarily multiply speeches, and divide one cause into many. Besides, the petitioner had obtained all the advantage likely to arise in his favour, from the effect of a general opening of his case most ably and powerfully made by his counsel; was the sitting member to be called upon under this disad-

Argument  
contra.

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wards agreed to argue the proposition, frame it himself.  
upon condition that he was allowed to     ? Ante, p. 273.

vantage,

vantage, to give a partial answer, without having on his part an opportunity of removing the prejudices raised against him, and of insisting upon the general merits of his case? As to the authorities cited, they were said not to apply to the present question. In the case of Bedfordshire, the committee first took all the votes objected to in each hundred separately: which was rather a convenient arrangement, than a division of the case; and even there, they left it open to themselves to repeal that arrangement, if it should be found inconvenient to the sitting member<sup>1</sup>: and yet this authority was over-ruled by the case of Buckinghamshire<sup>2</sup> which happened afterwards, and in which the committee decided the same question differently; and obliged the petitioner to go through his whole case. In the case of Cricklade, the only question was, on whom the burden of proof lay, as to the voters alleged by the petitioner to have been illegally received; that is, whether the petitioner had established such a charge of fraud and connivance against the returning officer, as to make it incumbent upon the sitting member to support the votes which had been received by him; or whether, as in the common case, the defects of their titles were to be shewn by those who impeached them. In the case of Great Grimsby the abstract proposition was framed, and argued by consent: and although, in those of Cirencester and Chippenham the general questions were discussed, according to the directions of the committee, against the consent of one of the parties; yet it must be remembered, that the discussion of abstract propositions differs exceedingly from the decision of separate subjects of evidence; for the former imports a disputed point of law, the determination of which may affect the admission of particular evidence, and render it material or immaterial; it may therefore frequently become necessary to establish the principle of law, before the facts of the case are investigated. The Gloucestershire committee required of the petitioner to go through the whole of his case, before the sitting member began his defence.

<sup>1</sup> 2 Lud. 388, 9.

<sup>2</sup> 2 Lud. 600.

On the part of the sheriffs it was said, that as they had been charged with partiality and improper conduct throughout the whole of the election, they could not be called upon for their defence till the whole of the evidence for the petitioner had been gone through, since it was plain that there was no part of it which might not in some degree affect them.

The committee decided, " That they will not now decide upon the mill votes, and the conduct of the sheriffs v." Decision.

Feb. 16. Several plans were then proposed for a meeting of the agents on both sides for the purpose of comparing the poll with the books of the assessment of the land-tax, and of extracting the names of such persons as did not appear to be assessed; but it happened that no proposal made on one side proved to be agreeable to the opposite party: at length the counsel for the petitioner in the regular course of the cause, gave in evidence 172 attested copies of the land-tax assessments for the county of Middlesex, and called Mr. John Ellis, who deposed that he had examined and compared the names and descriptions of the voters for the sitting member from an attested copy of the poll procured from the clerk of the peace, with the said assessments, and that the list <sup>w</sup> which he delivered in contained the names of all such as were not found to be rated and assessed, according to the description which they had given of themselves at the poll. The number was 1523 <sup>x</sup>. The counsel for the petitioner then declared, that this was the whole of the evidence which they meant to produce upon the subject of the majority of votes; and they offered either to proceed to give evidence of bribery according to the allegation of Mr. Mainwaring, or

Further proceedings.

Evidence.  
Land-tax  
assessments,  
compared  
with poll.

<sup>v</sup> See some of the cases in which a similar question has occurred, post. note (A).

<sup>w</sup> The same course was pursued by the counsel for the sitting member, when he entered upon his case. A name of a voter who had been objected to on the ground of non-assessment in the list of objections, appearing to be omitted in the compared list given in

upon oath before the committee, the objection was not suffered to be entered into. Vote of James Crofs, Apr. 19.

<sup>x</sup> The mill voters were comprised in this number. This list comprised those who were not assessed both in the names of landlord and tenant, though it was afterwards admitted, that a proper assessment of either was sufficient.

Scrutiny.

to decide by his judgment, to whom the majority of legal votes belongs; and how can he do that, unless he may also decide, by the same judgment, the legality of particular votes? This oath is otherwise a snare to the returning officer; and the terms of it are impossible to be fulfilled. A scrutiny is a revision of the poll; it existed at common law, and was nothing else but a more deliberate exercise of the judgment of the returning officer, upon the votes already received, in order to enable him with greater certainty to declare, who had the majority of votes. At common law, the powers of a sheriff during the scrutiny, were precisely the same as during the poll; but will it be contended that during the scrutiny he did not exercise a judicial capacity, and judicial powers? The statutes which regulate scrutinies, have introduced no new principle in this respect; they have only furnished directions for the mode of proceeding, and have given the returning officer authority (which before he had not) to administer an oath to such as will take it<sup>7</sup>. To these authorities may be added the very decisive and weighty opinion of Mr. Just. Blackstone, who describes the office of a sheriff at elections, in these emphatical words:

“ We shall find it of the utmost importance to have the sheriff appointed according to law, when we consider his power, and duty. These are, either as a judge; as the keeper of the king’s peace; as a ministerial officer of the superior courts of justice; or as the king’s bailiff.

“ In his judicial capacity he is to hear and determine all causes of 40s. value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases. He is likewise to decide the elections of knights of the shire (subject to the controul of the House of Commons), of coroners, and of verderors; to judge of the qualifications of voters, and to return such as he shall determine to be duly elected<sup>8</sup>.”

An eminent modern writer (Mr. Serjt. Heywood) has indeed expressed a different opinion; and has not only contended that a sheriff is no judge, within the sense of the word

<sup>7</sup> Stat. 25 G. 3. c. 84. s. 6.

<sup>8</sup> Com. 1 vol. p. 343.

as used in the case of *Ashby v. White*, where the question was whether he might be sued for refusing a vote; but has even adopted the opinion, that he may not judge of the legality of the votes tendered to him, but is obliged to admit any person to poll, who will take the oath prescribed by the law. The learned author states "several inconveniences which he says may result from a power being permitted to the sheriff to reject a voter who professes himself ready to take the freeholders' oath: but, surely, the inconveniences flowing from the contrary doctrine are infinitely greater. Fraud and perjury in every shape must be the certain consequence of an uncontrolled admission of persons who present themselves. There is, besides, the greatest injustice and inconvenience, in compelling the returning officer to take an oath, which the law forbids him to keep; for, according to this argument, a returning officer, sworn to make a return "according to his *judgment*, of him who shall have the majority of *legal votes*," is, notwithstanding, *ministerially* bound to return him, who, to his certain knowledge, owes his majority to the suffrages of persons who have supplied the want of every legal qualification by a false oath. The question in the case of *Ashby v. White* was, Whether the sheriff had a judicial character, to defend him from an action at law? not, whether he had a judicial power to distinguish a real elector from a pretender.

Feb. 20. Mr. Adam, in his defence of the sheriffs, entered very much at large into the nature of their office, and the powers belonging to it, which he contended to be purely ministerial; and that the idea of a judicial authority could be in no respect combined with the administration of their functions: that the only judgment they could exercise, was such a judgment as was required of the lowest officer to whom the law had committed the execution of any writ or other process; the use of the word in such cases rather implying the operation of the intellect in the performance of a particular duty, than the sentence of a constituted judge. He submitted, in the outset of his argument, the following

Defence of  
the sheriffs.

Judgment  
defined.

\* 1 Vol. p. 322.

*Proposition  
respecting  
the power of  
the return-  
ing officer.*

*Argument,  
that the she-  
riff is mini-  
sterial.*

*Authorities.*

proposition to the committee, as the foundation of the defence of his clients : " The power of the sheriff, as returning officer, is a bounded, limited power, without the means of inquiry, having neither place, time, circumstance, or authority for inquiry, from the necessity of the case resting on the best evidence the thing will admit of ; namely, on what the voter swears or what he says, which the statute (in this case) positively restricts to what he swears." He supported this proposition by the following arguments : The duty of a returning officer is only co-extensive with his power ; and his responsibility, with his duty. It has been attempted, on the other side, to extend both his duty, and his responsibility, beyond his power. The best way to determine what is required of him, is first to consider what he has authority to do. The counsel for the petitioner has chiefly relied upon the passage quoted from Mr. J. Blackstone, who cites, as the only confirmation of his position, Dalton's Office of Sheriffs, cap. 4. p. 25., where several instances are mentioned, of a judicial power being committed to the sheriff, as of holding pleas, &c. and in p. 35. it is said, " also in choosing knights for the parliament, the sheriff by the statute (to some purposes) is made a judge, *sc.* to examine, and to judge of the ability of such as be choosers of those knights <sup>b</sup>," but it is submitted that the word ' judge' in this passage is to be considered as implying a discriminating faculty of the mind, and not an exercise of judicial power ; since neither Mr. J. Blackstone, nor Dalton, afford any further information, as to the authority which this officer has to examine, or as to the process by which he may cite persons to appear before him, compel them to give evidence, or propose a test for the truth of it. They could not suppose a judicial authority vested in a person, who was not in possession of any facts upon which to form his judgment, or of the means of collecting those facts. It also appears from Dalton, that the sheriff executes the office by virtue of a special mandate from the king. Now the distinction between ministerial

<sup>b</sup> See also p. 333. " And so, the sheriff is here made a judge in this case, *sc.* to examine and judge of the ability

of these choosers of knights for the parliament." Stat. 3 H. 6. & 10 H. 6.



and judicial powers is this; that the latter are inherent in the office; the former are set in motion by a special mandate; as a writ, &c. Here, the sheriff acts in obedience to a special mandate, and is therefore ministerial. Mr. J. Blackstone does not seem deeply to have investigated this subject, but follow Dalton as his guide. Lord Ch. B. Comyns, among the instances of the ministerial duties of the sheriff, mentions his authority "in election of knights and burgesses for parliament, coroners, and verderors<sup>d</sup>." This opinion appears to have been built upon the judgment of Lord Ch. J. Holt in the great cause of *Ashby v. White*<sup>e</sup>, and upon that of the House of Peers, by whom the doctrine of Lord Holt was sustained. That great judge, after having mainly rested his opinion as to the competency of the plaintiff to sustain his action upon the ministerial nature of the sheriff's authority, urges the same consideration in the report of the judgment of the Lords, which is said to have been drawn up by him: it is there asserted; "That the officer

<sup>c</sup> Vid. stat. 7 & 8 W. 3. c. 25. f. 1. Dalton, in p. 33. mentions many instances where the sheriff acts judicially in the execution of a special mandate: as of the writ of waste, *nativo habendo*, re disseisin, &c., and see the whole of cap. 4.

<sup>d</sup> Tit. Viscount, C. 4. and see Buller's *Nisi Prius*, p. 64. where it is said, that an action upon the case lies "for wilful misbehaviour in a ministerial office, by which the party is damned."—"So, for refusing to take his vote at an election."

<sup>e</sup> 2 Ld. Raym. 950; and see 8 St. Tr. 139. The reader however will find in the whole of the arguments on each side, throughout the proceedings in that case, that it is taken for granted, that the returning officer has a right, and is bound to reject the votes of such as he holds not to be electors; and in the course of the debates in the House of Commons upon the petition of Mr. Fox against the conduct of the high bailiff of Westminster in Vol. II.

1784, it was admitted on all sides, and frequently taken as the foundation of the argument, that the power of the returning officer in taking the poll, is judicial and in declaring the numbers, ministerial. See Parliamentary Debates by Debrett, vol. xv. pp. 11. 92. 116. The following passage in the same report of the Lords committees, in *Ashby v. White*, affords a very clear and safe rule for his conduct; "nor is there any danger to an honest returning officer that means to do his duty; for where there is a real doubt touching the party's right of voting, and the officer makes use of the best means to be informed, and it is plain his mistake arose from the difficulty of the case, and not from any malicious or partial design, no jury will find an officer guilty in such a case, nor can any court direct them to do it; for it is the fraud and the malice, which entitles the party to the action." Ibid. p. 129. it proceeds; "in this case, the defendants knew the plaintiff to be a burgess,

St. Tr.  
loc. cit.

officer is only ministerial in this case, and not a judge, nor acting in a judicial capacity, is most plain; his business is only to execute the precept, to assemble the electors, to make the election, by receiving their votes, computing their numbers, declaring the election, and returning the persons elected; the sheriff, or other officer of a borough, is put to no difficulty in this case, but what is absolutely necessary in all cases. If an execution be against a man's goods, the sheriff must, at his peril, take notice what goods a man has."

Statutes.

The result of these authorities is, that the nature of the office of sheriff, in making returns to parliament, is ministerial, and not judicial<sup>f</sup>; it remains in the next place to enquire, whether or not the same result may be collected from several statutes that have been passed, relating to the same subject.

St. 2 G. 2.  
c. 24.

It has been said on the part of the petitioner, that the word judgment, used in the oath required by St. 2 G. 2. c. 24. to be taken by every returning officer, shews the office to be judicial; but it is submitted, first (as has been already observed), that this word judgment can only be understood to imply fidelity and integrity in the discharge of a ministerial duty; secondly, that the engagement entered into, is to be construed with reference to the means and powers which the returning officer possesses to fulfil it: if these means are inadequate, and these powers insufficient, a strict performance of it can neither be demanded by the moral duty which attaches itself upon an oath, nor by the law, which requires of no man what is impossible. Therefore, neither the mere admission of an illegal vote, nor consequently the return of a candidate unduly elected, of itself constitutes a crime. And this further appears from the frequent instances which occur, of returns being amended in favour of petitioners, and of votes being struck from the

a burgess, and yet fraudulently and maliciously hindered him from his right of voting; and justice must require that such an obdurate and unjust ministerial

officer should not escape with indemnity."

<sup>f</sup> See also 1 Whitel. 332. 357. cited 1 Heyw. 4. 309.

poll

poll by committees, without any blame being imputed to the returning officer. What then are the means given by the law for trying the qualifications of a voter? the oath of the voter; and none else. This test, as far as concerns the value of the freehold, was first allowed to be administered by the sheriff, by st. 8 H. 6. c. 7<sup>5</sup>. It is to be observed that this act gives him no authority to administer an oath to other persons, for the purpose of contradicting, or of confirming the voter in his oath; neither has he any power, at common law or otherwise, to examine witnesses, or receive evidence *aliunde*, in any way whatever. As for his own personal knowledge of the electors, their numbers have long since rendered that method of distinguishing them absolutely impossible. Three things may therefore be collected from the enactment of the st. 8 H. 6.; first, that the office is not judicial; since it would be absurd to call that power judicial, which consists, not in issuing process, examining witnesses, hearing the arguments of litigant parties, or investigating the true state of the facts, but simply in receiving the oath of the party himself: secondly, that the only means which the sheriff possesses, to try the qualification of the voter, is his oath: and, thirdly, that if the voter will swear himself duly qualified, the sheriff is bound to receive his vote; for even if he had the power to receive the evidence of others upon oath, to disprove what the voter had sworn, it would be his duty to believe him, till he was contradicted, not by an equal balance of opposite testimony, but by stronger evidence: how much less just then, would it be, to suffer the simple assertion of any number of bystanders, and voluntary witnesses, to prevail over an oath solemnly taken, and at the risque of such perilous consequences? Admitting, therefore, that before this statute, the sheriff was at liberty to oppose to the account given of himself by the elector, such information as he might receive from others, and to decide accordingly, the statute has taken away that discretion, by referring him to the test of the

St. 8 H. 6.

c. 7.

<sup>5</sup> "And every sheriff of the realm Evangelists every such chooser; how much he may expend by the year." of England, shall have power by the said authority, to examine upon the

Hertford-  
shire and  
Surry, 1695.

St. 7 & 8  
W. 3. c. 25.

St. 10 Ann.  
c. 23.

St. 18 G. 2.  
c. 18.

elector's oath. It is always to be remembered, that this conclusion is drawn with the exception of such cases as are from the nature of them palpably and evidently absurd; as where the voter is contradicted by his own declaration at the poll, &c. The cases of Hertfordshire and Surry, in 1695<sup>b</sup>, in which it was decided, "that evidence ought not to be admitted to disqualify an elector, as no freeholder, who at the election swore himself to be a freeholder, cannot be now cited as law; but they clearly afford the inference which Mr. Serjt. Heywood has drawn from them; namely, that a sheriff, in those days, would not have dared to exercise an authority, which the House itself did not possess. They shew, that the House of Commons considered the oath of the freeholder as conclusive. The stat. 7 & 8 W. 3. c. 25<sup>c</sup> imposed an oath in more precise and particular terms, to be taken by the elector, at the request of a candidate; by this oath, he must swear that he is a freeholder to the value of 40s. a year, and that he has not polled before at the election; and he must declare the place where his freehold lies. By ft. 10 Ann. c. 23. s. 4. upon the requisition either of a candidate, or of an elector, the freeholder is obliged to take an oath somewhat different from the last, in the stead thereof; being directed to swear, in addition to what was required of him by the statute of W. 3. that his estate was not granted to him fraudulently: and this oath having been also repealed by ft. 18 G. 2. c. 18. s. 1., the freeholder's oath, which has continued in use to the present day, was substituted in its place<sup>d</sup>: an oath, conceived in terms still more precise than any

<sup>b</sup> 21 Jour. 393. and see the cases collected 1 Heyw. 313, 314.

<sup>c</sup> S. 3. "You shall swear that you are a freeholder for the county of \_\_\_\_\_ and have freehold lands or hereditaments of the yearly value of forty shillings, lying at \_\_\_\_\_, within the said county of \_\_\_\_\_, and that you have not been before polled at this election."

<sup>d</sup> S. 1. "You shall swear, (or being one of the people called Quakers, you shall solemnly affirm) that you are a free-

holder in the county of \_\_\_\_\_, and have a freehold estate, consisting of \_\_\_\_\_ (specifying the nature of such freehold estate, whether messuage, land, rents, tythe, or what else; and if such freehold estate consists in messuages, lands, or tythes, then specifying in whose occupation the same are; and if in rent, then specifying the names of the owners or possessors of the lands or tenements, out of which such rent is issuing, or of some or one of them) lying or being at \_\_\_\_\_ in the county

any of the former, specifying the nature of the freehold, and referring to the length of possession in the voter: and by sect. 5. of the same statute, a penalty of 40*l.* is imposed, to be recovered by any candidate for whom the vote shall not have been given, from any person who shall vote at an election, without having such a freehold as is described by the terms of the oath. The fact of this oath having been made the subject of so many statutory provisions, strongly shews, that it was intended by the legislature to serve as the only test of the qualification of the freeholder; and that it was not supposed that the sheriff had a power of receiving evidence *aliunde*, or of examining the voter himself, beyond the terms of the oath; (except so far as the st. H. 6. gives him a power of inquiring into the value of the freehold;) and it is remarkable that neither these statutes, nor any other, either expressly mention, or at all allude to, any power in the sheriff to judge of the qualification of electors: their provisions immediately affect the voters themselves, and the penalty is inflicted, not on the officer who receives them, but on the voters who present themselves under a false title, which that officer can neither detect, nor disallow. It may also be observed, that the statute 25 G. 3. c. 84. s. 1. limits the duration of the poll of all the electors, to 15 days; but allows the space of 30 days to a scrutiny, which is but the investigation of a certain number of disputed votes. From this distinction, it should seem that the examination of a disputed title was no part of the duty of a returning officer at the poll; for otherwise, the time allowed him, appears, from the statute itself, to be much too short for that purpose.

county of \_\_\_\_\_, of the clear yearly value of forty shillings over and above all rents and charges payable out of, or in respect of the same; and that you have been in the actual possession or receipt of the rents and profits thereof, for your own use, above twelve calendar months, or that the same came to you within the time aforesaid, by descent, marriage, marriage-settlement, devise, or

promotion to a benefice in a church, or by promotion to an office: and that such a freehold estate has not been granted or made to you fraudulently on purpose to qualify you to give your vote; and that the place of your abode is at \_\_\_\_\_ in \_\_\_\_\_, and that you are twenty-one years of age, as you believe, and that you have not been polled before at this election."

An action  
lies against  
him as a  
minister.

The truth of the proposition stated at the commencement of this argument, has now been demonstrated. It has been shewn that the powers of the returning officer are limited, and that his means of investigation are confined to the oath of the freeholder. It has also been shewn that he is a ministerial officer; as such, it is no part of his duty to inquire into fraudulent or colourable titles; as such also, he is liable to an action for refusing the vote of an elector; as it was determined in the case of *Ashby v. White*: and the modern case of *Sargent v. Milward*<sup>1</sup> confirms the same doctrine. The law therefore requires of him no more than the upright and impartial execution of a ministerial duty, since it has given him neither power nor protection in the exercise of judicial functions; and the conduct of a returning officer should be examined with peculiar lenity, inasmuch as this burden is cast upon him by compulsion, without the liberty to reject it, and without any reward for the execution of it<sup>m</sup>.

Mr. Adam then discussed the facts that had been proved against his clients on the part of the petitioner, and opened the evidence which he proposed to offer in their defence: he contended, as the result of the whole, 1. that they had not acted illegally; 2. that they had not acted corruptly: with what success, the reader is again referred to the report of the committee to ascertain. Upon the conclusion of his

<sup>1</sup> Mentioned, 2 *Lud.* 248. The action was brought in the Common Pleas against the mayor of Hastings for maliciously refusing the plaintiff's vote; and he obtained a verdict for 200*l.* damages. A writ of error being brought in the King's Bench, the judges stopped the argument, by declaring that the point had been already settled in the case of *Ashby v. White*, in the House of Lords. In the case of *Drewe v. Coulton*, Launceston Spring Assizes, 1787, Wilton, J. held the action to lie only in cases where malice could be proved. See 1 *East Rep.* 563. *in not.* and 2 *Lud.* 245. S. C. It is to be observed that neither of these cases was taken notice

of by the House of Commons: but so late as the year 1767, 9th March, a complaint was made of actions having been brought against the sheriff of Pembroke-shire, for refusing the votes of certain persons: on the 6th April the House were informed that the actions were about to be discontinued: and upon being informed (on the 9th April) that they had actually been discontinued, it was resolved that the House would not proceed to hear the matter of the complaint. See the Journals of these dates.

<sup>m</sup> See 1 *East. Rep.* 565. and see the case of *Metcalf v. Hodgson*, Hutton's Reports, 120.

addresses,

address, he proposed to call his witnesses; but the counsel for the petitioner insisted that the sitting member's case should first be opened; the counsel for the latter, as well as Mr. Adam, objected to this proposal; but the committee determined "that the sitting member should now proceed to open his case." Mr. Plumer accordingly <sup>a</sup> addressed the committee on the part of Sir F. Burdett; after which the witnesses for the sheriff's were called and examined <sup>b</sup>. Their evidence related to the construction of the hustings, the order observed in the conduct of the poll, and the manner in which the case of the mill-voters was argued; it was designed by this latter evidence, to shew that they were justified upon the statement of the facts as represented to them, and upon the arguments by which they were supported, in receiving them. It may be proper, in this place, to give a short account of the circumstances of these persons, and of the property in respect of which they were permitted to vote, as they appeared from the evidence produced on the part of the petitioner, and of the sheriffs.

The sitting member to open his case, before witnesses are called on behalf of the sheriff.

Substance of the sheriff's defence.

In the month of May, and in the beginning of June, 1801, certain persons living at Isleworth, formed themselves into a society called 'The Good Intent Society;' the purpose of which was to grind corn at a cheap rate for their own use: their number was not above four, or five, till 11th June, when a meeting of them and of their friends was held, and the 27th July was fixed to be the day when their subscriptions should commence. These subscriptions, however, were not regularly begun to be made, or entered in their books till the 4th Aug.; at which time the society consisted of between 80 and 90 persons, who held among them 120 or 130 shares; the plan was, to have 1002 shares, when the society should be complete.

History of the mill-voters.

On the 24th Aug. 1801, a memorandum of an agreement was drawn up between Richard Friday, and "the Inspectors of the Good-Intent Society on the behalf of the said society," by which Friday agreed to sell a certain piece of freehold land in Isleworth, with three houses standing there-

<sup>a</sup> 20th Feb.

<sup>b</sup> 23d and 24th Feb.

<sup>c</sup> 22d Feb.

on, to the said society, who, on their part, agreed to give him 360*l.* for the same. This agreement was signed by Friday; and by 11 inspectors, of whom Albion Cooper was one.

On the 13th Oct. in the same year, a second agreement was made, between Friday, and 15 persons by name, on behalf of the society, 11 of whom had been parties to the former agreement, whereby it was recited, that by certain rules and articles, bearing date 27th July, 1801, made and entered into between the said persons and many others, a society had been agreed to be formed called the Good-Intent, for the purpose of supplying the subscribers with bread and flour at their own houses, at prime cost; that it was necessary for that purpose to erect a mill; and that the purchase of the above-mentioned piece of land, &c. from Friday, had already been contracted for: and it was agreed, that Friday, in consideration of 360*l.* paid or secured to him, should sell and convey the premises to the said 15 persons, and should clear away the ballast, so that a barge might moor close to the said ground. There appeared to be some doubt as to the time when the possession of this land was actually delivered up by Friday to the society, but this rather seemed to have taken place immediately after the agreement in August; however, it appeared from the testimony of all the witnesses, that the possession was delivered up as from the Midsummer preceding<sup>9</sup>. The piece of ground thus contracted for was about 90 feet long, and 45 feet wide: the three cottages which then stood upon it, were in the occupation of yearly tenants, at the rent of six guineas each: by the advice of Friday, the rent from Midsummer was given up by the society to the tenants, in consideration of their quitting at Michaelmas. Upon the premises becoming vacant the society caused two of the cottages to be pulled down, and began to erect a mill, which, however, at the time of the election, was far from being

<sup>9</sup> It was represented at the hustings, and seems to have been there admitted as a ground of argument on all sides,

that the possession was given up 27th July 1801: at which time the subscriptions were made to commence.

finished,



finished, being not yet covered in; so that no profit whatever had at that time accrued to the society, either from the mill, or from the land.

Friday himself was the treasurer of the society, from 20th Aug. 1801. On 28th Sept. he received 100*l.* in part payment of the consideration for the sale; he received 50*l.* more a short time before the election; and soon after the election was finished, he received the remainder of the 360*l.* The conveyance was made some time in the year 1803. Friday, in his evidence before the committee, spoke at first of an agreement so early as June 1801, and that it had been reduced into writing; but upon further recollection he would not undertake to speak positively to the date of it, even within two, or three months; and no agreement prior to the 24th Aug. was produced, or proved.

On the 13th July 1802 (the first day of the election) the number of subscribers was between 200 and 300: from the 27th to the 30th no fewer than 200 persons, being for the most part labourers and mechanics, entered their names as subscribers. A new member paid 2*s.* 6*d.* upon his admission, and 1*s.* *per* week afterwards, for 42 weeks. Some of the persons admitted on the 27th and two following days, paid their entrance money, and at the same time advanced their payment for the 42 weeks, at once: others paid for their admission, and 1*s.* only, for the current week. 7 or 8 of the subscribers voted for the sitting member on the 27th, and a very large number on the 28th, many of whom had been admitted only the day before: on the 29th, not above 13: but several more presented themselves to vote on that day, and being told they had no vote, retired.

Albion Cooper, on the 13th day of the poll, 27th July 1802, was the first person who tendered his vote for the sitting member, for his property as a member of the society which has been described. He was objected to by the inspector who attended on the part of the petitioner, and was carried round to the sheriff's box. Here a witness, in the presence of the sheriffs and of the voter, gave an account of the constitution of the society, the number, and nature of the shares, the present state of the mill, and, that possession

Albion  
Cooper.

possession of the land had been delivered on the 27th July, 1801. Cooper, on his examination before the sheriffs, stated that he was possessed of two shares in the concern; that he had been in possession of them for more than twelve months, having been one of the original projectors of the plan, and the possession of the premises having been given to the society as from Midsummer 1801; and that although he had received no profits from them as yet, he would not part with either of them for 40*s. per annum*. Upon being examined as to the nature of those profits, he stated that he expected to have, for each share, four quartern loaves *per week*, at two-thirds of the market price: the price of a quartern loaf at that time, was nine-pence. The counsel for Mr. Mainwaring argued against his right to vote, first, upon the ground of a want of possession for 12 months: secondly, of a want of sufficient value: thirdly, that the voter was not assessed. And their arguments were controverted on the other side. Sir W. Rawlins on being requested by Mr. Mainwaring's counsel to reject Cooper's vote, after consulting with his under-sheriff, refused so to do; alleging, that although his opinion was, that Cooper had no right to vote, the sheriff was only ministerial, and could not refuse either to receive the vote, or to administer the oath, if the voter was willing to take the oath, and insisted upon voting: that nevertheless, he would admonish the voter of his duty; which he accordingly did. Cooper retired for half an hour, and then returned and took the oath, and his vote was admitted. The arguments upon his right lasted for three or four hours. Another person, who was said to have been admitted the night before, coming to vote the next day for a similar share, was objected to for want of possession, and as coming within the statute of W. 3. against splitting tenements; but the sheriffs refused to hear any more arguments; alleging, that the whole subject had already been thoroughly discussed; and from that time no questions were permitted to be asked the voters, concerning the length of their possession, till on the last day of the election: when the question was put to several, whether they had been in possession 12 months: upon their answering that they had not, one of the sheriffs

(Sir

(Sir W. Rawlins) informed them they could not vote, and in consequence, they did not vote.

As the reader may be curious to be informed by what arguments Cooper's title was supported before the Sheriff, the following short heads of them are extracted from the evidence given before the committee. It was said, that joint-tenants were seized *per my*, & *per tout*: the possession of one, was the possession of all, and of the whole land: that an agreement for a sale carried an equitable freehold, although the conveyance was not actually made, nor the whole of the purchase-money paid: that the statute requiring a possession of 12 months, was satisfied, by the property having vested in the elector for that time; and that it was not necessary that he should be in the occupation of it. That although the statute required a possession of 12 months, it did not require that the freehold should have been for so long of the value of 40*s.* *per ann.*; it was sufficient, if it was so at the time of voting: that it is required of the voter to have been in actual possession of the land, or to have received the rents and profits thereof, for above 12 months; therefore, an actual possession was sufficient, without the perception of any rents or profits at all. That so long as the land was of the annual value of 40*s.* it was not necessary that it should actually have produced a profit of 40*s.* during the year before the election: and instances were put of an estate recently wasted by rebels, or left untilled for the purpose of defrauding a parson of his tithes; and, of a growing wood. That if these shares did not give a title to vote, no property, the profits of which depended upon speculation, could give a title. As to the assessment, that it had been assessed in the spring, 1801, in the name of the owner at that time; and no new rate having been made, till within six months of the election, it was impossible that the names of the present owners could appear; and that it could not be supposed that the act intended to deprive persons, in such circumstances, of their franchise.

Argument  
in support of  
the right of  
Albion  
Cooper.

St. 18 G. 2.  
c. 18. s. 5.

The report of the committee (made 3d July) upon this part of the case, was as follows:

Resolved,

Special re-  
port.

‘ Resolved, that it appears to this committee, that on the 13th, 14th, and 15th days of the poll, on the first of which days there was a considerable majority of votes in favour of W. Mainwaring, Esq., the sheriff, Robert Albion Cox, Esq. and Sir William Rawlins, Knt. wilfully, knowingly, and corruptly did admit to poll for Sir F. Burdett, Bart. upwards of 300 persons, claiming to vote under a fictitious right, as proprietors of a mill purported to be situate in the parish of Illeworth, and called the Good-intent-mill, by which means a colourable majority was obtained in favour of Sir F. B., who was thereby returned as having the greatest number of votes.

‘ Resolved, that it appears to this committee, that on the 15th day, towards the close of the poll, after such majority was established, they rejected persons tendering their votes under the same circumstances.

‘ Resolved, that it appears to this committee, that the sheriff, at the poll, acted in a judicial capacity, by admitting counsel to argue the validity of votes, and by deciding, in some instances, on the validity of such votes: that, in other instances, they refused to decide on the validity of votes which were objected to; and stated, that they would admit any persons to poll, who would take the oaths, declaring themselves to be only ministerial officers, thereby acting in a manner contradictory to their practice in other cases, and in flagrant violation of their duty.

‘ Resolved, that it appears to this committee, that the obvious tendency of their conduct was to admit persons having no right to poll, and to afford the greatest encouragement to perjury.’

It was ordered that the report, and also, that so much of the minutes of the committee as related thereto, should be printed.

Proceedings  
in the House  
thereupon.

After several debates, and after hearing the counsel for the sheriff at the bar of the House, of which proceedings the reader will find the entries in the Journals of 21st Jan. 1805, 25th Jan., 29th Jan., 1st Feb., 5th Feb., 8th Feb., 13th Feb., 19th Feb., 27th Feb., 1st Mar., and 8th Mar.;

On

On the 11th Mar. the House agreed with the committee in their resolutions, and also resolved, ' that the said R. A. C., Esq. and Sir W. R., Knt. by their conduct and practices at the said election, as stated in the foregoing resolutions, as well as by refusing to refer to the assessments for the land-tax', acted in violation of their duty, contrary to law, and in breach of the privilege of this House.' And it was ordered, that they should be committed to Newgate. On the 10th May they were discharged, after receiving the following reprimand from the Speaker:

Sir William Rawlins, and Robert Albion Cox,

' Your conduct having undergone the severe but just animadversion of this House, followed by a sentence of ignominious imprisonment, it is fit to be understood by you, and by all men, what this House has considered to be the character of your offence, and upon what grounds you are this day to be liberated.

Sheriffs reprimanded.

' The sum of your offence is this : that you, being the sheriff and returning officer, did, at an election for the county of Middlesex, for the purpose of giving a colourable majority to one candidate in prejudice of another, wilfully, knowingly, and corruptly admit fictitious votes upon the poll ; that your inconsistent and contradictory practices afforded the greatest encouragement to perjury : and that you refused to examine the validity of votes by reference to the land-tax assessments, in defiance of the laws of your country.

' Greater offences than these cannot be laid to the charge of any men holding the high office with which you were then invested : an office to which you were raised by the free choice of your fellow-citizens in the metropolis of this empire, and of which office you betrayed the most important duties ; violating at once the freedom of elections, the privileges of this House, and the just constitution of parliaments.

' Upon these charges, established by ample and conclusive evidence, you were committed to his Majesty's gaol of New-

\* This relates to another charge of which produced no subject of argument misconduct against the sheriffs, disclosed in the course of the evidence, worthy to be reported.

gate,

**Acts of a  
sub-agent,  
evidence.**

the avowed agent during the course of the election for all lawful purposes". 3. That Mr. Hindley having as agent to Mr. Mainwaring, ordered that the directions of Mr. Newcomb should be followed, (with respect to treating the voters) the directions which Mr. Newcomb gave in consequence of this order, were held by the committee to be admissible in evidence against Mr. Mainwaring. Upon Mr. Piggott declining to reply on the part of his client, Mr. Adam also forbore to observe further upon the case of the sheriffs.

**Report.**

On Monday, 9th July, the committee, having sat 120 days, reported that Sir F. Burdett was not duly elected: that W. Mainwaring, Esq. was duly elected, and ought to have been returned: that at the last election W. M., Esq. did by his agents, commit acts of treating, whereby he was incapacitated to serve in parliament upon such election: that the last election was void, so far as it respected the return of the said Sir F. B.: together with the usual resolutions that neither the petitions, nor the opposition to them, were frivolous, or vexatious.

#### Incidental points.

**The return-  
ing officer,  
in his de-  
fence, is not  
permitted to  
give evi-  
dence of  
treating  
against the  
petitioner.**

Mr. Adam, as counsel for the sheriffs, in his cross-examination of the first witness for the petitioner, put some questions to him concerning certain houses supposed to be opened for the voters, by Mr. Mainwaring, or his agents: it was objected, that this could form no part of the defence of the sheriffs; but rather belonged to the case of the sitting member. The committee admitted the objection; and the witnesses were in the sequel cross-examined both on the part of the sheriffs and of the sitting member.

**Agency  
must be  
proved, be-  
fore criminal  
acts.**

A witness, having proved upon his cross-examination that the Castle at Brentford had been open during the election for the reception of Mr. Mainwaring's friends, and that one C. had paid, in the presence of the witness, for the provisions furnished to them; was then asked, what sum had been so paid? This question was objected to, as tending to introduce the acts of a third person, before his employment, or agency, had been proved. In answer to the objection,

\* See ante, vol. i. p. 467.

an observation made by a member of the committee in the late case of Midhurst<sup>u</sup> was stated, namely, that where the agency, and the offence to be proved, were in their nature mixed, not to allow the evidence of the facts themselves in the first instance, was in reality to exclude that which tended to prove both the agency, and the offence itself, at the same time.

The committee determined, "that proof of agency must be brought forward, before any evidence of criminal acts is given; and therefore, that the question be not put<sup>w</sup>."

Mr. Sylvester, the recorder of London, who had been counsel for Mr. Mainwaring during the election, and was called as a witness on his part, was proceeding to relate a conversation between himself and Mr. Welch the under-sheriff, upon the subject of the mill-voters. The conversation took place at the hustings, while these men were tendering their votes, and taking the freeholder's oath: but the sheriffs were not present, nor had any proof been given of the agency of Mr. W. It was objected, that the sheriffs being criminally implicated, such evidence could not be received against them; that in general, a conversation between third persons was inadmissible, except where it had been held in the presence of the party accused; in which case, the demeanor of the party during such a conversation, might with propriety become the subject of evidence against him: another exception was, where the person whose declarations were offered in evidence, had been first proved to be an agent: which had not been done in this case; for it by no means followed, that because Mr. W. was the under-sheriff, every word which he had said was spoken by the particular authority and command of his superior.

On the other hand it was said, that the question being upon the admissibility, not upon the effect of the evidence, the consideration, how far it might criminate the sheriffs, was not now to be entered into. As to the admissibility of it, the returning officer was bound to be present at the election, either personally, or by his deputies, for whom he was re-

What has been said by the under-sheriff at the poll, cannot be proved, to affect the sheriff criminally, unless an express authority be shown.

<sup>u</sup> The next case.

<sup>w</sup> See vol. i. p. 7. 209. 304. 467. 479.

sponsible. He could not therefore get rid of his responsibility, by sending his deputies to act for him; otherwise, in a county election, where there were many places for polling, he might commit the greatest partiality with impunity, by contriving so, that the most flagrant instances of it should take place at those booths, where he was not present. It was also submitted, that if this evidence should not be held sufficient to charge the sheriffs criminally, still it was admissible as part of the *res gesta*, so far as related to the illegal admission of the mill voters, and to the right of the petitioner to have the return in the first instance declared in his favour.

In reply, it was admitted that what was done by the undersheriff, under the constituted authority of the sheriff, in his absence, such as the admission or rejection of votes, was evidence; but it was again insisted, that he could not be presumed, without proof, to have made use of any particular expressions, by the command of his principal, who was to be criminally charged therewith.

The committee rejected the evidence\*.

A witness  
protected  
from crimina-  
ting him-  
self: but

Albion Cooper took the freeholder's oath, and voted, at the election, for the sitting member, in right of one of the shares of the Good-Intent mill. He was called as a witness

\* See vol. i. p. 375.

It may be useful in this place to bring to the notice of the reader what was said by the Master of the Rolls (Sir W. Grant) in the case of *Fairlie v. Hastings*, 10 Vesey jun. Rep. 126. "An agent may undoubtedly, within the scope of his authority, bind his principal, by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So, with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality.

The party therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways, I do not know, how what is said by an agent can be evidence against his principal.—The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say, a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."



on the part of the petitioner, to prove what passed at the hustings when he gave his vote, and by whose persuasion it was, that he was induced to take the oath. The witness himself objected to his being examined, and the counsel for the sitting member requested the chairman to inform him, that he was not obliged to give an answer to any questions which might hereafter be opposed to his oath, or which might tend to criminate himself: and the case of Southwark was cited, in which the publicans who were called to prove the charge of treating against Mr. Thellusson, were cautioned by the chairman not to answer any question which might tend, in their own opinions, to criminate themselves. It was observed by one of the committee, that it might still be safe for the voter to answer many things which might be opposed to what he had sworn, since the charge of perjury consisted in wilfully swearing what was false. To this it was answered, that the examination could hardly be entered into, without drawing from the mouth of the voter himself the fact of his having taken the oath: at his trial for perjury, he might defend himself either by proving the innocence of his intention, or the truth of what he had sworn; or he might deny that he had sworn at all, and put it upon his prosecutor to prove it; but the last ground of defence would be taken away from him, if he were now obliged to declare the fact, upon his oath. The second objection made against his testimony was, that the examination tended to invalidate his own title to vote. The counsel on the other side disavowed any intention to criminate the witness, or to destroy his vote, by his own testimony: they said, that the purpose of calling him was to shew the criminal conspiracy of other persons to carry the election by fabricated votes; to shew who those persons were, and to what means they had resorted. And they said, that the books belonging to the society of the Good-Intent mill being in the custody of the witness, who was one of the trustees, they had also a right to call upon him to produce them, for the purpose of affecting the votes of the rest of the mill voters. The committee

allowed to be examined (for the purpose of criminating the sheriffs) as to matters which had an indirect tendency to invalidate his own vote.

\* 7 Clifford, 103, 104. But see Mr. Clifford's observations upon that determination. *Ibid.*

admitted the witness, and directed the examination to proceed, the witness having been admonished "that if any question should be asked him which he thought would criminate himself, he might claim the protection of the committee not to answer that question."

Scrutiny of  
votes.

It has been thought advisable to separate the scrutiny of votes, from the general account of the course of the trial, in order more conveniently to arrange the cases that occurred in the former. These cases will be disposed according to the following analysis \*:

Analysis.

I. Mode of proceeding adopted by the committee, in the scrutiny.

II. Lists of objections delivered by the parties to each other, by order of the House of Commons.

Proceedings of the committee with respect to them.

III. Questions arising from the description of the voter on the poll.

1. General resolutions of the committee with respect to the entries on the poll.

2. Insufficient description of the voter's residence.  
of the situation of his freehold.  
the nature of it.  
the occupier of it.

3. Untrue description of himself.  
his residence.  
the situation of his freehold.  
the nature of it.  
the occupier of it.

IV. Questions arising from the statutes requiring the assessment of the voter's freehold to the land-tax.

1. Not assessed as described on the poll.

In the name of the owner or tenant.

\* The reporter has subjoined such of the decisions of the House in the cases of Yorkshire 1734, and Oxfordshire 1755, and of the select committees in the cases of Gloucestershire 1777, and of Cricklade, Bedfordshire, and Buckinghamshire 1785, as appeared to apply to the subjects of the decisions here reported.

in respect of the situation of the freehold.  
of the nature of it.

2. Not duly assessed ;

In the name of the owner or tenant.

From some irregularity in the form, &c. of the  
assessment.

In respect of the nature of the freehold.

In respect of the time of the assessment.

3. Of exemptions from assessment ; in the case of

Rent charges,

Fee-farm-rents,

Land-tax redeemed,

Offices,

Succession by marriage, descent, devise, or  
preferment.

4. Evidence of assessment.

V. Questions relating to the estate of the voter ; arising,

1. From the nature of it,

2. the value of it,

3. the local situation of it,

4. the title of the voter to it.

5. his interest in it.

6. the time of his possession of it.

VI. Questions relating to the person of the voter ;

1. In respect of office.

2. the receipt of alms.

3. being an alien.

VII. Questions relating to evidence.

1. Who is permitted to be a witness, or to produce  
written evidence.

2. Who is compellable to be a witness, or to produce  
written evidence.

3. Who is disabled in point of interest from being a  
witness.

4. Of witnesses who have been in the committee-room  
during the trial.

5. Of the reproof or punishment of witnesses, for im-  
proper conduct.

6. Of written evidence.
7. Of parole evidence to explain written evidence.
8. Of hearsay evidence.
9. Of the confession or declarations of the voter.
10. Evidence of particular facts.

### I. Mode of proceeding adopted by the committee in the scrutiny.

Evidence for the petitioner on the head of assentment.

Opening of the sitting member's case.

Evidence for sitting member to justify his own votes.

The committee resolve to decide on the votes separately.

It has already been stated<sup>a</sup>, that on the 16th Feb. a list was given in, on the part of the petitioner, of persons who had voted for the sitting member, and who upon examination, were found not to be rated to the land-tax, according to the description they had given of themselves at the poll. On 22d Feb. Mr. Plumer opened the case of the sitting member, by generally stating the grounds of objection upon which he meant to disqualify the petitioner's votes. On the 25th the counsel for the sitting member entered upon their evidence; and began, by defending their own votes, which had been affected by the evidence of the petitioner. 25th Feb. The entry on the minutes is as follows: "The counsel on the behalf of the sitting member stated that they should now proceed to the defence of the votes which are objected to by the petitioner upon the ground of not being duly assented.

"The counsel, having by agreement desired the committee to decide on the validity of each vote objected to on the head of not being assented, as it arises, and also that the counsel for the objection should begin, and reply: and that only one counsel on each side should be heard;

"The committee determine, that they will adopt the mode of proceeding recommended by counsel, unless in any particular instance the committee should see special reason to depart from the rule."

<sup>a</sup> *Ibid*, p. 17. What is there stated, viz. that this was all the evidence produced by the petitioner upon the subject of the majority of votes, will be referred to evidence impeaching the sitting

member's votes, and not to evidence in support of his own votes, of which he produced a great deal in the subsequent stage of the trial.

The votes were arranged by the different hundreds, and again, by the parishes in which the freeholds were situate, and by divisions of parishes, where such existed; they were called on alphabetically in each division, and decided upon separately<sup>b</sup>. It was agreed by the counsel on each side, and resolved by the committee, that when one parish had been gone through, it should not be returned to on any account, except where the consideration of particular votes should be expressly deferred, on account of witnesses not attending, or for some other special reason. It may be proper here to mention the case of John Jolly, April 25, whose vote being called on in one parish, it appeared by the evidence that his freehold was in another; notice of this had been given by the party who was to support the vote (the petitioner), when the votes in the parish in which the freehold was actually situated, were under discussion; and his counsel now objected to the examination of the vote. From his description of the situation of his freehold upon the poll, (being a street) it did not appear in what parish it was situate. The committee determined to proceed upon the vote, but they resolved, for the future, "that if the counsel for the petitioner give notice to the counsel for the sitting member, in a case where it is doubtful where the freehold is situate, the counsel for the sitting member shall proceed on the vote, in the parish, where it is stated by such notice to be actually situated; but if the counsel for the petitioner have required a vote to be examined in one parish, he shall not be at liberty afterwards to defend it in any other."

A parish  
once gone  
through not  
to be re-  
turned to.

Vote called  
on in the  
wrong  
parish.

On the 9th of April the committee proceeded to try the objections made by Sir Francis Burdett, against the votes of Mr. Mainwaring, and they determined, "that they would decide on the validity of each vote separately, unless they

Scrutiny of  
the votes  
for sitting  
member.

<sup>b</sup> This was the mode of arrangement pursued by Mr. Mainwaring in his list of objections, and adopted by the committee, with the consent of the sitting member. It was not attempted on either side to add any rejected voter to

the poll. The Bedfordshire committee held, that it was not necessary to insert the names of persons so intended to be added, in the lists of objections. See 2 Lud. 392.

should see any reason to depart from that rule." \* Lists were put in on the part of the sitting member, of the names of the persons who, by a comparison of the entries on the poll with the books of assessment, did not appear to have been duly assessed \*. It was considered, that the evidence on this head was then closed: for when afterwards (April 28) the counsel for the sitting member proposed to call an assessor to shew that a voter (John Dixon) was not duly assessed, the committee determined, "that the counsel for the sitting member should bring no further evidence with regard to assessment." The trial of Mr. Mainwaring's votes continued till Wednesday the 4th of July, when it appeared, that Mr. Mainwaring had a majority of 110 votes upon the poll, and that only 57 of those votes had been objected to. The committee hereupon came to a determination that they would suspend the scrutiny, as has been already mentioned, *ante*, p. 31. It may easily be supposed that the number of votes decided upon in each day differed extremely, according to the nature of the questions that arose, both of fact and law; in order to quicken their proceedings, the committee, having been frequently obliged to adjourn before the usual hour on account of one of the parties not being prepared to proceed to the scrutiny of other votes, determined, 26th May, "that they expected the parties should be prepared to proceed each day with one hundred votes at least, and that they would not listen to any excuse for stopping short of that number; that such votes as the committee might permit to stand over should be included in that number of one hundred."

## II. Lists of objections delivered by the parties to each other, by order of the House of Commons.

The following resolution is passed by the House of Commons at the commencement of every session: "that in all

Annual resolution of House of Commons.

\* The Gloucestershire committee heard the whole of the evidence on the part of the petitioner, against all the votes objected to, before any evidence was received on the other side to substantiate them. See the case, p. 87. And it appears that the same course was adopted by the Buckinghamshire com-

mittee, 1785. See 2 Lqd. 600. In the Bedfordshire case, the evidence to impeach the votes in a particular hundred was first heard, and then the evidence to support them; after which the votes given for the opposite party were gone through in the same manner. See 2 Lqd. 388. 393.

cases,

\* See *ante*, p. 11.

New evidence not allowed to prove non-assessment.

Closure of the scrutiny.

Resolution to go thro' 100 votes each day.

cases of controverted elections for counties in England and Wales<sup>d</sup>, the petitioners do, by themselves or by their agents, within a convenient time, to be appointed by the House, deliver to the sitting members, or their agents, lists of the persons intended by the petitioners to be objected to, who voted for the sitting members: giving in the said lists, the several heads of objection, and distinguishing the same against the names of the voters excepted to; and that the sitting members do, by themselves or by their agents, within the same time, deliver the like lists on their part to the petitioners, or their agents."

In pursuance of this resolution, an order was made, 14th April 1803, that before 1st May, similar lists should be delivered by each party in the present case: this order was discharged 26th April, and on 12th June, the day for the exchange was fixed to be 1st Nov. The parliament was prorogued 12th Aug. and met again 22d Nov.

Orders of the House of Commons in this case.

In the list delivered in by the sitting member the voters were classed alphabetically, without any other arrangement or distinction, and the christian and surname of the voter was all that was stated, except where there were more than one person of the same name, in which case, the place of abode was added. Opposite to the name of each voter, one or more objections were stated; sometimes to the number of five or six. The objections were as follow:

List of the sitting member.

1. No freehold.
2. No freehold as described on the poll.
3. No freehold of the yearly value of 40s. clear of rents and charges.
4. No freehold in the occupation of the tenant named on the poll.
5. No freehold in the hundred [or division] in which he polled.
6. Not resident as described on the poll.
7. Not assessed to the land-tax.
8. Not duly assessed to the land-tax.

Objections to the petitioner's votes.

<sup>d</sup> The interchange of these lists is provided for in all cases of Irish controverted elections, by st. 42 G. 3. c. 106. See the case of Waterford, *ante*, vol. i. p. 218.

## ELECTION CASES.

9. Not in possession of his freehold twelve months before the election.
10. Voted for an annuity or rent-charge not duly registered, or of which a certificate has not been duly entered.
11. Not 21 years of age at the time of voting.
12. A foreigner.
13. A pauper receiving alms.
14. Did not vote.
15. Convicted of wilful and corrupt perjury.
16. Bribed to give his vote.
17. Voted under undue influence.
18. Disqualified by office from voting.
19. Occupier of the alleged freehold not specified.

List of the  
petitioner.

In Mr. Mainwaring's list of objections, the whole of the voter's description upon the poll was inserted. The list was arranged by hundreds and divisions, and by parishes in each hundred and division; the names in each parish being placed alphabetically. The following were the objections made; by comparing the figures set against them with the corresponding figures in the sitting member's list, the reader will see how the lists differ from, or agree with, each other.

Objections  
to the sit-  
ting mem-  
ber's votes,

1. No freehold.
  - Estate held by copy of court roll.
  - Estate held for a term of years, trustee not being in the actual possession or receipt of the rents and profits.
  - Redeemed land-tax no title to vote.
  - Purchase of land-tax no qualification.
2. No freehold as described on the poll.
  - No freehold as described.
  - No such freehold as described.
  - No such place of freehold as described.
  - No such freehold in the county of Middlesex.
  - No such place of freehold in the county of Middlesex.
  - No such street, [or, place] as ———
  - Place of freehold not known, [or, described.]
  - Place of freehold not duly, [or, sufficiently] described.
  - Place of freehold not in the county.

Place



Place of freehold not in the county of Middlesex.

Freehold not sufficiently described.

No such place known in the parish as the voter has described as the place of freehold.

Nature of freehold not described.

Nature of freehold not sufficiently described.

3. Freehold not of the yearly value of 40s. above all rents and charges.

Estate mortgaged, or otherwise incumbered.

Mortgagor, [or, voter] not in the actual possession and receipt of the rents and profits.

Voter voted in right of his wife's dower, not being of the yearly value of 40s., nor the voter in the actual possession or receipt of the rents and profits to his own use.

4. No such occupier as named, [or, described.]

No house in the occupation of the voter at ———

Occupier as described not tenant to the voter.

Occupier not sufficiently-described.

No such occupier as voter has described.

No such person as the occupier known.

No such occupier known as described.

Neither voter nor occupier known in the parish.

5. There is no objection taken similar to No. 5. in Sir Francis Burdett's objections.

6. The place of residence not sufficiently described.

The voter's place of residence, and also the place of freehold, not sufficiently set down and described.

No such person at ——— as the voter or occupier are described.

No such freeholder at ——— as the voter is, [or, has] described.

Voter's place of abode not duly, [or, sufficiently] entered [or, described.]

Neither voter's place of abode nor place of freehold sufficiently entered [or, described.]

Voter not known as described.

Voter's residence not known as described.

Voter's residence not described.

No such place of residence as described.

Voter

Voter not known in the parish.

Places of voter's abode and freehold not sufficiently described.

Voter not known in — street.

Description of residence insufficient.

Voter not sufficiently described.

Voter not known.

7, 8. Not duly assented.

9. Not in the actual possession or receipt of the rents and profits to his own use above twelve calendar months.

10. No certificate of annuity, or rent-charge, or memorial registered pursuant to the statute.

11. Voter under the age of twenty-one years.

12. [See No. 5.]

13. Voter received alms within twelve months before the election.

Voter received alms or parochial relief within twelve months, [or, a year] before the election.

14. The voter not the person represented.

The person represented did not vote.

Not the person represented.

This vote was given for Mr. Byng only.

No such person as —

15. Voter convicted of wilful and corrupt perjury.

16. Voter had reward, or promise of reward, contrary to law.

Voter had reward, or promise of reward, viz. by money, meat, drink, provision, or entertainment, contrary to law.

17. [See No. 5.]

18. Disqualified by office in the revenue.

Disqualified by office in the public revenue.

19. No occupier named, [or, stated.]

Nature and occupation of freehold not sufficiently described.

20. Voter an idiot, or *non compos mentis*.

21. Freehold fraudulently granted on purpose to qualify the voter to give his vote.

22. Voter's christian name wanting.

Christian

Christian name of voter not stated.

Christian name of voter not sufficiently set down and described.

Christian name of voter not sufficiently described.

23. Voter voted more than once.

Voter voted more than once at the election.

24. More than one person voted for this estate.

25. [To parish clerks.] Not duly appointed.

26. [Ditto.] Voter's licence not registered.

27. [To clerk in orders.] Voter's licence not duly granted or registered\*.

It has already been observed, that the petitioner relied upon the objection of non-assessment only, although other objections were stated in his list to many of the voters for his antagonist. The sitting member had usually affixed several objections to the name of each voter. These last were all read, as soon as the voter's name and description upon

How far parties confined to the objections stated.

\* See 2 Lud. 570. 574. 577.

The following were the objections made by the petitioners, against the voters for the sitting member, in the case of Middlesex, 1806. See *post*.

1. Voter not the person represented.
2. Voted more than once.
3. Bribed to give his vote.
4. Not resident as described on the poll.
5. No freehold.
6. No freehold as described on the poll.
7. No freehold in the occupation of the tenant named on the poll.
8. Not assessed to the land-tax.
9. Not duly assessed to the land-tax.
10. Voted under undue influence.
11. A pauper receiving alms.
12. No freehold in the county of Middlesex.
13. No freehold of the annual value of 40s. clear of rents and charges.
14. Not in possession twelve calendar months.
15. No freehold in the division in which he polled.
16. No freehold in the hundred in which he polled.

17. Situation of the freehold not sufficiently described on the poll.

18. Occupation of the alleged freehold not stated.

19. Voted for an annuity, or rent-charge not duly registered, or of which a certificate has not been duly entered.

20. Disqualified by office from voting.

21. Did not vote for the sitting member.

22. Not 21 years of age at the time of voting.

23. An alien.

24. Residence not sufficiently described on the poll.

25. Voter illegally entered on the poll, after three o'clock in the afternoon of the 15th day of the election.

26. Nature of alleged freehold not described on the poll.

27. Nature of alleged freehold not sufficiently described on the poll.

See the petitioner's list of objections in the case of Buckinghamshire, 1785. 2 Lud. 602.

the

One of several objections relied upon.

New objection disclosed upon the cross-examination of the witnesses called to support the vote.

the poll had been read : but it soon appeared that not above one or two of the objections stated were meant to be insisted upon. The counsel for the petitioner having strongly objected to this proceeding, as not directing them to what points their defence should be addressed, and as leading to a great length of desultory and irrelevant examination, the committee directed the following line to be adopted : namely, that when a voter's name was called, his counsel should name the objections upon which they meant to rely : and that having named these objections, they should not afterwards resort to others, which they had not so named. For instance, it frequently happened, that where a voter had been objected to for non-assessment, for his freehold not being in the occupation of the tenant named on the poll, and for several other causes, and the counsel for the sitting member had intimated that they meant to rely on the objection of non-assessment, it appeared from the cross-examination of the assessor or some other person, called as a witness to account for the difference in the assessment, that the freehold was not in the occupation of the tenant named on the poll. In such a case, the committee refused to enter into the question of the occupation.

12th Mar. Robert Crigg. Objection ; assessment. 'The witness called to answer the objection was cross-examined by the counsel impeaching the vote, to prove, that the voter had given in a wrong occupier : this was objected to ; and the committee determined, " that the counsel should confine his examination to the ground of assessment, or to any thing which has arisen out of the examination."

In consequence of this determination, the counsel for the sitting member, in all cases where they named the objection of non-assessment, named that also of a wrong occupier, where it was contained in the list, in order to take the chance of what might come out upon the cross-examination of the petitioner's witnesses. This was objected to, (in the case of Daniel Sibson, 28th April) by the counsel for the petitioner, who requested of the committee, that the cross-examination might be confined to the point to which the witness was called, namely, the assessment : but the committee refused to accede to the request. In the case of Brook Watson, (1st May) who

The committee re-

was

was objected to both for want of assessment and for having given in a wrong occupier, another attempt was made to prevent the effect of these cross-examinations, by requesting the committee to decide separately, and in the first instance, upon the question of occupation, as the counsel for the sitting member so frequently declined to produce witnesses to substantiate that objection. But the committee determined, that they were entitled to avail themselves of the benefit of their cross-examination, upon any part of the case.

fuse to decide upon the objections separately.

The reader will presently see, that the committee considered themselves bound to take notice of defects appearing upon the face of the poll, in the description of the voters objected to, although such defects had not been made specific grounds of objection in the lists.

Objections appearing on the face of the poll.

If, in the attempt to substantiate the vote, either by reconciling the assessment where it appeared contradictory to the entry on the poll, or explaining an apparent variance, the counsel defending, in the course of their examination of their own witnesses, shewed a defect in the vote, the committee noticed it, and allowed the counsel impeaching the vote to address their cross-examination to any defect disclosed by the examination in chief, although the objection so disclosed, was not named by them, nor even contained in the list. As, for instance, to prove the assessment of Samuel Owen, *poft.* an assessment was produced, where the occupier was duly assessed, but the name of a different proprietor appeared. In such a case, by a rule of the committee, which will be mentioned hereafter, it became necessary to shew that the voter was the proprietor of the premises so assessed. To prove this, a conveyance to the voter was produced, from the date of which it appeared that he had not been 12 months in possession; and this objection arising from the evidence in support of the vote, the committee held it to be fatal, although it was not contained in the list of the opposite party, and therefore could not have been made the subject of evidence by them<sup>f</sup>.

New objection disclosed by the party supporting the vote.

In

<sup>f</sup> The Bedfordshire committee held that where the voter had described his freehold to consist of a house and land, and it was objected to for non-assessment, upon its appearing to be in fact an annuity issuing out of land, advantage

In other cases it appeared from conveyances introduced under similar circumstances, that the voter had taken an interest less than freehold. And the same rule was enforced upon many occasions, in which it appeared from the evidence of the assessor who was called to reconcile the assessment, that the voter had given in a wrong place of residence, or a wrong description of his freehold, &c. The rule was expressed in the following determination :—(1st March, vote of William Young.) “ that although the objections made on the part of the petitioner to the votes of the sitting member are confined to the ground of assessment, yet if in the course of the evidence given by the counsel for the sitting member in defence of such votes, any facts should arise, tending to impeach the validity of such votes, the committee will determine on the merit of such votes, on the grounds, on which they shall have been so impeached.” They made a similar determination on the same day in the case of John Thomas, who was objected to on the ground of assessment only. From the evidence adduced to remove the objection, it appeared that the voter had only been in possession of his freehold since Lady-day 1802 : and the vote was decided bad upon that ground. And in the same manner they struck off the votes of the petitioner objected to by the sitting member, for defects not named by the sitting member in his list of objections, but disclosed by the petitioner in the evidence adduced in support of the vote <sup>b</sup>.

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tage might be taken of its not being registered, though that objection had not been made. 2 Lud. 502. 504.

<sup>c</sup> It rather appears from Mr. Luders, 2 vol. p. 534. that the Bedfordshire committee did not, in general, think themselves authorized to notice objections not originally insisted upon by the parties. And see p. 541.

<sup>d</sup> The reader will already have remarked, that all the objections discussed in the trial of the cause till 9th April (except that of non-assessment) arose either upon the face of the poll, or

upon the evidence disclosed by the witnesses called to support the vote : since the only objection insisted upon against the sitting member's votes was non-assessment, and the trial of those votes lasted till that day. The reporter has for the most part omitted to state whether the objection was made in each case originally by the opposite party, or disclosed in the manner above-mentioned ; except in those cases, where the manner in which the objection arose was a material part of the discussion.

The other decisions of the committee, respecting the form and nature of the objections, were as follow:

25th Feb. Thomas Garman. In the list of objections on the part of Mr. Mainwaring, the christian name of the occupier of the voter's freehold was stated to be George, instead of John, as stated on the poll. The committee would not strike the voter's name out of the list, but proceeded to discuss the objections.

Name of the occupier wrongly described in the list.

25th Feb. Joseph Tatem. The voter's residence was stated in Mr. Mainwaring's list to be Dilt, instead of Dyot-street. It was contended on the part of the sitting member, that although it was not necessary to have stated the voter's residence at all, yet, where one party, in his list of objections, took upon himself to state it, and stated it incorrectly, the committee would not suffer the objection to be proceeded in, since the other party, who was to support the vote, might be misled by this misdescription. The committee over-ruled the objection, and proceeded to examine the vote.

Residence of the voter wrongly described in the list.

29th Feb. Zachariah Bowman. The petitioner, in his list of objections, had classed this vote in the Finsbury division. He had in fact voted in the Tower division. The counsel for the sitting member objected to the vote being called in question; but the committee determined, "that the objection to entering into the consideration of the assessment," (i. e. the objection made to the vote) "was not valid, but that the counsel might postpone it, till they came to the Tower division<sup>1</sup>."

Voter classed in a wrong division.

1st March, Thomas Pierce. In the list of objections, Matthew Pierce. The committee determined, that his vote should not be questioned.

Voter objected to by a wrong christian name.

12th March. Lucius Concannen. In the list of objections, Laurence Concannen. On the poll, the christian name of the voter was perfectly illegible. The committee in this case, suffered the objections to the vote to be proceeded upon.

Id. Where the poll is illegible.

<sup>1</sup> The principle of the decision in the three foregoing cases was, that an error in the list of objections, in matters not necessary to be inserted, and which in fact had in no instance been inserted by the other party in his list, should not obstruct the scrutiny of the votes. See the decision of the Bedfordshire committee in the case of Stanley Burroughs, 2 Lud. 418. which seems *contra*.

Voter objected to by a wrong surname.

27th March. Humphry Tunkinon, one of the Mill-voters, was objected to by the name of Henry Tomkinson. The counsel for the petitioner contended that this vote ought to be struck off, without any further proof; it appearing upon the face of the poll, that it had been given in respect of the same property, as those of the other Mill-voters, against whom a resolution of the committee had already been passed. The committee determined, that the vote of Humphry Tunkinon, not being objected to by the petitioner, is not brought under consideration.

Freehold out of the county given in evidence under the objection of no freehold, &c.

24th April. John Taylor. Objections; "no freehold; no freehold as described on the poll; no freehold in the division for which he voted." It was proposed to shew that the premises for which he had voted were situated in the city of London, and not in the county of Middlesex: it was insisted, that it was not competent for the party objecting, to give any such proof, since this had not been included in the list of objections. But the committee resolved that the evidence might be received; and the premises being shewn to be in London, and not in Middlesex, the vote was declared bad.

But not, possession within 12 months, under the objection of no freehold:

27th April. William Abud. He was objected to as having no freehold; and as having no freehold as described on the poll. The witness who was called to establish these objections, was asked whether the premises had not been conveyed to the voter within a year previous to the election. The committee determined that such evidence, not applying to the objections given in, should not be entered into.

Nor, a wrong occupier, under the objection of no such freehold as described.

30th June. Richard Friday. The objections relied on were, "no freehold; no freehold as described on the poll; not duly assessed." He had voted for land in his own occupation. The assessor was called to explain the assessment; and was asked in his cross-examination by the counsel who impeached the vote, if Friday had any land in his own occupation? It was said that this question ought not to be put, because it pointed to another objection, which had not been made; namely, that the voter had no freehold in the occupation of the tenant named on the poll. It was answered, that the question tended also to shew



shew, that he had no such freehold as he had described on the poll: but the committee determined, that the question should not be put.

30th June. Edward Batsford. He voted for a share in Fulham Bridge. Objection, "not assessed." In the assessment, the property was rated in the name of the proprietors of Fulham Bridge. It therefore became necessary to shew that the voter was a proprietor \*, and a conveyance was produced to Edward Batsford, dated 1799. The counsel who objected to the vote, proposed to shew, that this Edward Batsford, to whom the conveyance was made, was not the same person who had voted at the election. The committee rejected this evidence, since no specific objection had been made that the voter had no freehold, or, no such freehold as described on the poll. It was then proposed to shew that the voter had sold his freehold before the election: but the committee determined, "that no doubt arising on the face of the deed put in by the petitioner," (to answer the objection of non-assessment) "no evidence should be received to contradict the purport of it, or to shew that the voter had no freehold<sup>k</sup>."

The identity of the voter not to be questioned under the objection of non-assessment.  
\* See p. 68.

Not proof allowed of his having sold his estate.

\* Under the objection of non-assessment, the House, in the Oxfordshire case, 1755, refused to receive evidence, that part only of the freehold for which the vote was given was assessed, and that that part was under 40s. *per annum*. 27 Jour. 72. It does not appear, however, that they considered the statute complied with, if a part only of the voter's freehold, under the value of 40s., were assessed: for they afterwards (p. 181.) resolved to admit evidence that part only of the freehold voted for, was assessed to the land-tax, and that such part was not of the clear yearly value of 40s. The Gloucestershire committee resolved, in the words of the case of Yorkshire 1735, 22 Jour. 604. that the counsel be permitted to give evidence of the voter's having no freehold at all, to whom the objection was, that

he had not a freehold of the annual value of 40s. p. 105. (The same resolution was made in the case of Oxfordshire, 1755, 27 Jour. 172.) They determined, p. 122. "that the objection taken to the voter being, that he had no freehold estate in the premises for which he voted, and it appearing in the poll-book that he voted for a rent reserved out of lands, the counsel be restrained from offering evidence to prove that his freehold consisted of a rent-charge;" (and not registered.) p. 128.: that under the objection of no freehold in the premises voted for, evidence might be given that he had no freehold in the parish named on the poll. Where the objection was "not assessed," they permitted the party supporting the vote, to shew an assessment in a different parish from that named on the poll. p. 125.

#### IV. Questions relating to the description of the voter upon the poll.

##### 1. General resolutions of the committee with respect to the entries on the poll.

No evidence  
to correct  
the poll.  
See *post*.

With respect to the description of the voter upon the poll, the committee determined not to admit any evidence to correct the poll, by shewing that the voter had given a different description from that which had been taken down by the poll-clerk<sup>1</sup>. Where the name, &c. taken down by the poll-clerk, bore a similarity in point of sound to the real description of the voter, the committee decided in each case, whether the difference should be considered to be the mistake of the clerk, or a misdescription on the part of the voter; and in all cases where the similarity of sound was such as to justify them in the former supposition, they allowed the vote. See *post*, head of Assessment.

*Idem sonans.*

Objections  
upon the  
face of the  
poll, not  
stated in the  
lists of ob-  
jections.

2d March. They resolved, that when the particulars of description on the poll did not appear to comply with the forms prescribed, the committee would decide on the validity of such description: and, that unless the description required<sup>m</sup> under the different heads on the poll-book appeared complete on the poll, the vote should be rejected: that is, although the insufficiency of the description had not been made a ground of objection by the opposite party, in the lists delivered. These resolutions were made in the case of

<sup>1</sup> The Gloucestershire committee resolved, p. 139. not to admit evidence to contradict the descriptions or entries in the poll book, but they allowed evidence to explain them. They also permitted evidence to be given that a voter had been sworn, although the word *jurat* was not set against his name. p. 163. The Bedfordshire committee received parole evidence to correct the poll. See 2 Lud. 403. and 1 Lud. 377. In the Oxfordshire case, 1755, 27 Jour. 285. the House refused to receive the evidence of a check book, or parole evidence, to shew that the voter had voted for a freehold lying in a different place from that which is entered in the original poll-book: or that the voter

had named a different occupier. Reference was made to the cases of Rutland, 26th Jan. 1710, and Bedfordshire, 14th July, 1715.

<sup>m</sup> The Gloucestershire committee determined that such a defective description (e. g. where the voter had not specified his tenant) was a *prima facie* objection sufficient to put the petitioner on proving the necessary qualifications to entitle him to vote. p. 93. They also determined "that it was necessary for every freeholder at the election, when he polled, to give in the name of the parish, hamlet, township, tithing, or place, in which his freehold is situate." p. 140.

Thomas Mapleson, who had caused the word "unknown" to be inserted in the column of occupiers in the poll<sup>a</sup>. It was argued in support of his vote, that the stat. 18 G. 2. c. 18. s. 1. was in this respect only directory, and contained no provision for making the vote void, if the occupier's name was not specified. 2. That the committee would not take upon themselves to decide questions not submitted to them by the parties, and upon points which had not been made the grounds of objection. On the other side it was said, that the committee, if they perceived, by the entry upon the poll itself, that the vote was bad, could not suffer it to remain there; that in cases where the freeholder's oath was required to be given, the voter was obliged by stat. 18 G. 2. c. 18. to give in the name of the occupier upon oath, before he was permitted to vote; and therefore, that in this case, since he had not given in any occupier, it was clear that his vote should not have been received. At the election, every voter had taken the freeholder's oath.

## 2. Insufficient description of the residence of the voter.

10th April. James Jenkins. Residence, "London." It was suggested that this was too general, and it was said that the committee would take notice of this defect, as it appeared upon the face of the poll: see *ante*, p. 52. But as this was the first question that had been made with respect to the description of residence, and the objection had not been taken to any of the votes for the sitting member, the committee determined, that they would not now take that subject into consideration, unless it should appear, (as it did not in this case,) that the vote was specifically objected to upon that ground, in the list delivered in by the sitting member.

12th June. Peter Holford. The voter described himself "Master in Chancery;" without adding any place of Office.

<sup>a</sup> The columns in the poll-book corresponding with the directions of the st. 18 G. 2. c. 18. s. 1. (see *ante*, p. 20.) were as follow:

Voter's name. | Residence. | Situation of freehold | Nature thereof. | Occupier's name. |

The Bedfordshire committee did not consider a similar defect of description sufficient to invalidate the vote. See the case of Ch. Chester, Esq. 2 Lud. 413. He had named as his occupiers, "several persons."

his abode. The committee held this description defective, and the vote bad.

Incumbency.

23d April. Rev. T. Farmer. In the column of residence, "Rector of St. Luke's." This was held sufficient: and in all cases, the name of the parish was held a sufficient description for the incumbent either as to the situation of his freehold, or his residence. And see *post*, vote of Rev. G. Harpur, p. 56.

Insufficient description of the situation of the voter's freehold.

The name of a parish in the metropolis too general a description.

3d March. Richard Lloyd. Situation of freehold, St. Giles's. The committee determined, upon this occasion, "That the name of the parish, without a more particular local description, is not sufficient, within this metropolis" °. On the 5th of March, the counsel for the petitioner made an application to the committee to rescind this resolution, since it would prove destructive to the votes of a great many persons, who were real freeholders; or at least to qualify it, by throwing the burden upon the party for whom the vote was given, to shew where the freehold of persons, who had given in such a general description, was actually situated. The committee determined, "that they did not see sufficient reason to alter the resolution." But they afterwards relaxed it in cases where the freehold consisted of land.

Liberty of the Rolls.

1st May. David Caddel described the situation of his freehold (a house) to be the Liberty of the Rolls, a district forming a small part of the parish of St. Dunstan's, and containing about 350 houses. The committee held this description to be sufficient.

Insufficient description of the nature of the voter's freehold.

Described in another column on the poll.

30th March. John Meadowcroft. In the column of "the situation of the freehold," the voter caused to be inserted, "Exigenter of the Common Pleas;" leaving blanks in the columns of "the nature of the freehold," and of "the name of the occupier." The description was held sufficient.

° This rule is to be understood with exception of such cases as that of Mr. Farmer, *supra*.

8th June. — Meade. Nature of freehold, "Tenement." It was objected that this description was uncertain, and would apply to any species of freehold; but the committee resolved to take it in its more familiar sense, as a house, and held the description to be sufficient.

19th June. Joseph Jefferson, described the situation of his freehold to be "St. Anne's, Soho;" and the nature of it, "Preferment in the church." The committee held this description to be sufficient; but required of the party who supported the vote, to shew the kind of preferment, in respect of which Mr. Jefferson claimed a right to vote.

20th June. Edward Taylor. Nature of freehold, "Part of a messuage." It was said that this appeared from the description given by the voter himself on the poll to be a split vote, and contrary to the stat. 7 & 8. W. 3. c. 25. s. 7., which enacts, "that no more than one single voice shall be admitted to one and the same house or tenement;" and that although joint-tenants, and tenants in common, (perhaps by too liberal a construction of the statute) had been permitted to vote in respect of their undivided interest, yet there had been no instance of a vote being admitted (for a county) in respect of a distinct and separate portion of a house. The counsel who supported the vote began to contend, that it was incumbent upon the other side, in order to bring this case within the statute of W. 3., to shew that another vote had been given in respect of the other part of the house; but the committee desired them to prove, if they could, that the voter was a joint-tenant, or tenant in common, of the whole house; and it being shewn accordingly that he was a joint-tenant of the whole house, the vote was declared good.

Insufficient description of the occupier of the voter's freehold.

2d March. Thomas Mapleson. Occupier, "unknown." It has been already observed, that this was held an insufficient description: as was also (29th March. Vote of W. Shepherd,) occupier, "Nos. 3 & 4."

Occupier, "unknown" bad.

"No. 3 and 4."

In general,  
some occu-  
pied must  
be named.

26th May. George Whytock. In the column of occupiers, a blank. It was suggested, that this defect might be taken to be owing to the remissness of the poll-clerk, who had neglected to ask the voter for the name of the occupier; and that the former decision of the committee was founded upon the apparent neglect of the voter himself. The committee however were of opinion that this was a fatal defect, and fell within their resolution of 2d March. *Vide ante*, p. 52.

Case, where  
no occupier  
need be ex-  
plicitly  
stated.

29th May. Rev. G. Harpur. Situation of freehold, "Stepney:" nature of it, "Rectorship," and no occupier inserted. The committee held the description to be sufficient. See *ante*, p. 54, votes of Rev. T. Farmer, and of John Meadowcroft.

### 3. Untrue description of the residence of the voter.

The place  
where the  
voter sleeps  
must be  
given in as  
his resi-  
dence.

March 17th. J. W. Vaughan. Residence, "Prince's-street." It appeared that he carried on his business in Prince's-street, but that he slept in Orange-court, where his freehold was; and where another person lived as a lodger. The committee decided the vote to be bad.

### Untrue description of the situation of the voter's freehold.

Immaterial  
difference.

9th April. James Cross. Situation of freehold, "John-street, St. Sepulchre." It was situated in St. John-street. Evidence was given that no street in the parish of St. Sepulchre was named John street. The committee held the difference to be immaterial, and decided the vote good.

Popular de-  
scription.

31st May. John Hitchins. Situation of freehold, "Greenfield-street, Whitechapel." Part of the street is in Whitechapel, and part in Mile End Old Town. This property was in fact in the latter, but very near Whitechapel. The assessor said, that although persons who well knew the boundary, would make a distinction, yet that the whole street was more generally and popularly called Greenfield-street, Whitechapel; that the premises were assessed in Mile

End ; and that a mark was made in the street at the division between Mile End and Whitechapel. In support of the vote, it was contended, that the popular description was even better than the legal description, since the object of the statute was to direct the search of those who might inquire after the voter. On the other side it was said, that the legal description was necessary, in order to satisfy the terms of the oath. The committee determined the vote to be good.

4th July. Mark Burr. Situation of freehold, "Uxbridge." Uxbridge is a township of the parish of Hillingdon, assessed separately to the land-tax, and to the poor's-rate. Part of the principal street of Uxbridge runs into the township of Hillingdon ; this part, when it is necessary to distinguish, is called Hillingdon-end ; but in common language it is spoken of as part of Uxbridge. The premises, for which the voter had voted, were situated in this part of the township of Hillingdon, but the committee considered the description to be sufficient.

— March. John Nixon. Situation of freehold, "Collins's-court, Wapping." It appeared that Collins's-court was in Shadwell, and the committee declared the vote to be bad <sup>1</sup>.

It may be proper here to mention the determination of the committee, upon a case, in which the voter had polled in a booth belonging to a hundred in which in fact he had no freehold. Polling in the wrong hundred.

16th April. John Baker was objected to as not being duly assessed, and as having no freehold in the hundred for which he polled. He had voted in the hundred of Edmon-ton for a freehold in Hackney ; which is situated in the Tower division of the Ossulstone hundred. It was proved that the names of the different hundreds were affixed, in

<sup>1</sup> In the Oxfordshire case, 1755, 27 Journ. 277. the House refused to permit the party supporting the vote to shew that the voter had a freehold in a different parish from that in which he described it at the poll to be situated ; or in a different hundred, from that in which he had voted. *Id.* The Bedfordshire committee held it to be a fatal objection that the voter had given in a wrong parish. 2 Lud. 416.

large letters, to the different booths, and that printed lists of the parishes contained in each hundred were distributed at the hustings.

St. 18 G. 2.  
c. 18. s. 7  
& 8.

By the stat. 18 G. 2. c. 18. s. 7. the sheriff is required to affix on the most public part of each booth the name of the hundred, &c. for which the said booth is designed; and by s. 8. it is enacted, that he shall not "admit any person to vote for any lands, tenements, or other freehold estate, sworn by the said oath to be lying and being at some parish, town, or place, or parishes, towns, or places, which parish, town, or place, or parishes, towns, or places, or any of them, or any part of them, is not or are not mentioned in the list so made out for such booths or polling places as aforesaid, unless such lands, tenements, or estate lie or be in some town, liberty, or place not mentioned in any of the lists so made out for all the said booths, or polling places as aforesaid."

It was contended, that this mistake was fatal to the vote. That the voter was bound to proceed to that booth which was allotted to the particular hundred where his freehold lay: that the statute was not only directory to the sheriff, but binding on the elector also; and intended as well to prevent confusion at the poll, as to facilitate the inquiry after his estate, in case his vote should become the subject of a scrutiny. They cited the case of *D. Reynolds*, 2 Lud. 420. where the voter polled in the hundred of Flitt for a freehold in the hundred of Willey; and the vote was held to be bad: and of *Robert Willan*, 2 Lud. 510., and *John Oliver's*, *ib.* 414<sup>r</sup>.

It was answered, that the object of the statute was not to facilitate inquiry; for that purpose was fully answered by the very particular description which the voter was bound to

\* His vote was received in the wrong hundred, and entered as situate in a certain parish, in which it was not; the parish in which it was situate not being comprised in the hundred where his vote was received. He was admitted as a witness to prove

that he named the right parish; but the vote was decided bad. And see a similar resolution, p. 420. See also the Gloucestershire case, p. 120., where it was determined, that the voting in the wrong booth was the fault of the poll-clerk, and did not vitiate the vote.



give of himself, and his freehold at the poll, upon oath: that it was a direction addressed to the sheriff, and to the candidates; but not communicated to the voter. It was the duty of the sheriff to send the voter round to the proper booth, as was the case with respect to D. Reynolds, whose vote was declared void, because he did not give his vote in either hundred. In the cases of Willan and Oliver, the former voted in right of premises for which he was not assessed: the latter, for a parish in which he had no freehold. But there was an instance in the case of Gloucestershire, p. 120. exactly in point with the present: "Benjamin Peirce. Objection, no freehold; the place he voted for not being in the list, in the booth where he polled. As the poll clerk had admitted him to vote, though contrary to the directions of the act, the committee were unanimous that he ought not to lose his vote, and therefore over-ruled the objection."

The committee determined, "that a voter who has been admitted by the sheriff or the poll clerk to vote at the wrong booth, does not thereby lose his vote."

The counsel for the petitioner applied to postpone the consideration of several votes objected to in the same circumstances. The objections were called on in the hundreds for which they voted; but it was requested that their cases might stand over, till the votes of those hundreds were called on, in which they ought to have voted. The committee consented that they should stand over.

Baker's vote was admitted to be bad, for want of assessment.

Untrue description of the nature of the voter's freehold.

31st May. John Barfoot. Nature of freehold "Land." The premises were proved to consist of a stable and cartshed, with no more land adjoining, than a very small slip, not above 6 feet broad. The committee were of opinion that the freehold was improperly described as land, and determined the vote to be bad.

A small yard appertaining to a building, ill described as land.

5th June. William Clappeson. Nature of freehold, "Houses and land." Situation, "St. Georges in the East." This description was defective for the houses, under the resolution

Same point.

solution of the committee, 3d March. See *ante*, p. 54. With respect to the land, it was proved to consist merely of two small gardens appertaining to the houses: which the committee did not consider to come sufficiently within the description of land, and determined the vote to be bad.

Share in a  
bridge, well  
described as  
"rent."

30th June. Thomas Foster. Nature of freehold "rent." He voted for a share in Fulham Bridge. Certain persons, by stat. 12 G. 1. c. 36. (A. D. 1725) were appointed commissioners for the erecting and repairing Fulham Bridge, over the Thames from Fulham in Middlesex to Putney in Surrey, and a power was given to the Crown to incorporate them. In fact they never had been incorporated, but some years afterwards they conveyed by lease and release the whole of the bridge, together with the tolls, profits, &c. to certain persons (in 30 shares, of which the voter had two) in consideration of their repairing and maintaining the bridge. It was contended that these shares were not properly described by the word rent, which signifies (as applied to a voter) something which he has, charged on land, where he has not the land itself. Here the voter had a freehold in the land itself, upon which the bridge stood, and on which the profit arose, and therefore he should have called it a share in the bridge, and not a rent. It was answered, that although it might have been called land, or a share in the bridge, still there was no impropriety in calling it a rent; that the word rent was not to be taken in its legal sense; for the stat. 18 Geo. 2. c. 18. s. 1. requires every voter to swear he has been in the possession of the *rents* and profits of his freehold for above 12 months, which could never be true in the case of a person who occupies his own land, if the word rents were to be construed so strictly; that therefore the voter must be taken to mean the profits of his share of the bridge and of the tolls thereof, which in the popular sense of the word might be called a rent. The committee decided the vote to be good.

Rent-  
charge, as a  
"fee-farm  
rent."

2d July. William Bennett. Nature of freehold "fee farm rent." It appeared in fact to be a rent charge, granted to the voter for life, and had been duly registered. The vote was held good.

Untrue

## Untrue description of the occupier.

27th February. Hayman Dyson. Occupier, "Self." One occupier, given in, out of two or more, sufficient.  
 It appeared that the occupiers were, the voter, and Charles Dyson. Upon this occasion it was agreed between the parties, and adopted as a rule by the committee, that where a voter, having two or more tenants, gives in the name of one of them only, it is sufficient.

In several instances where the voter had given in the name of a former occupier, and it was proved that another person was in fact the occupier at the time of the election, the vote was disallowed. A former occupier, bad.

19th March. Daniel Wiltshire. Occupier, "Charles Osborne:" which was said to be a mistake for John Oyfton. John Oyfton being examined as a witness, said that he had paid rent to the voter for nine years, and that no person of the name of Osborne lived in the same street with himself. The committee decided the vote to be bad. Wrong occupier.

16th April. Charles Stable. Occupier, "John Harding." The name of the occupier was in fact, Thomas Harding. This had not been made a ground of objection to the voter, but was disclosed upon the examination of witnesses called to remove some other objections. The committee determined the vote to be bad for want of the true occupier being stated. Wrong christian name.

19th April. Robert Harry Sparks. Occupiers, "Gale and Webb." These were the persons to whom the voter had demised the house. It appeared however that no person was in the actual occupation of it at the time of the election. It was contended in support of the vote, that since there did not appear to be any under-lessee, or any person in the occupation of the freehold, different from those stated by the voter, he had done right in stating the original lessees, his tenants, as the occupiers. The committee determined the vote to be good. The lessee of a house rightly named as occupier, though he did not reside there.

27th June. Robert Kentish. Occupier, "— Evans." An occupier named when the house was empty.  
 It was proved that the house was empty at the time of the election; and no evidence was given of Evans being a lessee. The committee determined the vote to be bad.

Under-lessee.

Weekly tenants.

Monthly tenants.

Similarity of sound.

Tenant of other premises than those voted for.

The committee determined in several instances that where a voter gave in his original lessee, and it appeared that the lessee had underlet the premises to others, the description was defective, and the vote bad. Where it appeared, however, that the premises were only let to weekly tenants, it was determined that such persons need not be given in as occupiers, and it was held sufficient to state the original lessee, or the voter's self, (if there had been no other letting,) as the occupier. This was determined in the case of Thomas Moore Fosket, 23d April: but in the case of — Longuet, who gave in as his occupiers, certain persons who held the premises of him by the month, it was objected that he should have given in himself as the occupier, conformably to the principle of the above determination; but it was resolved, that the description was sufficient.

Many cases occurred where the name of the occupier on the poll was not exactly the right name of the actual occupier, but bore a greater, or a less resemblance to it. The question upon these occasions was, whether the variance was such as was likely to have happened from the mistake of the poll-clerk in taking down the real name of the occupier as it was stated to him by the voter, or from the voter naming a different person. In doubtful cases, evidence was frequently given, against the vote, to shew that persons of the name which appeared on the poll had formerly lived in the premises, or in the neighbourhood, or were otherwise connected with the voter; and in support of the vote, that these circumstances did not exist: as in the case of Daniel Wiltshire, *ante*, p. 59. It is needless to multiply particular instances of this kind.

23d April. Robert Lloyd, voted for premises in Golden Lane, in the occupation of "Hooker and others." His freehold consisted of two houses, one situated in Golden Lane, the other in Hand Court, with a yard between them. Hooker, whom he named as the occupier, occupied that in Hand Court only. There were separate assessments for Hand Court, and Golden Lane. The committee determined the vote to be bad.

19th May. John Fisher. In the occupier's column, "Under repair." The committee held this to be sufficient, and said they would take this to mean that the premises were in the voter's own occupation.

11th April. John Merrington. Occupier on the poll, "Self." Objection, "No freehold in the occupation of the tenant named on the poll." In support of the objection, the assessment was produced, in which the name of John Gray was entered as the tenant. The committee held this to be no evidence that the voter had given in a wrong occupier.

Book of assessment no evidence of a wrong occupier.

#### IV. Questions arising from statutes requiring the assessment of the voter's freehold to the land-tax.

##### 1. Not assessed as described on the poll; in the name of the owner, or tenant.

In order to enable the reader more distinctly to comprehend the following cases upon the subject of assessment to the land-tax, a view will in the first place be presented to him, of the several statutes by which the assessment of the voter's property has been required, and in the second place, a short account of the principles adopted by the committee, and of the course of their proceeding in the application of the statutes in force at the time of the trial of this petition.

General view of the statutes, and of the rules of construction adopted by the committee.

By stat. 10 Ann. c. 23. s. 2. it is enacted, that no person after 1st May 1712, shall vote for a knight of the shire, (in England) "in respect or in right of any lands or tenements, which have not been charged or assessed to the public taxes, church rates, and parish duties, in such proportion as other lands or tenements of forty shillings *per annum*, within the same parish or township where the same shall lie or be, are usually charged." By stat. 12 Ann. c. 5. it is sufficient, if they are charged to some one or more of those taxes, &c. 'The object of the former statute appears from the pream-

Statutes. 10 Ann. c. 23.

12 Ann. c. 5.

\* It is proposed at present, only to mention the general enactment of these statutes; the exceptions, or modifica-

tions, which have been applied to particular cases, will be taken notice of hereafter.

ble

- ble of the stat. 12 Ann. c. 5. to have been only "to ascertain the value of lands or tenements, by making the proportion paid to the public taxes, church rates, and parish-duties, or such of them to which the same were usually charged or assessed, the measure of the value thereof." The before-mentioned clause of 10 Ann. c. 23. was repealed by stat.
- 18 G. 2. c. 18. f. 2; and by f. 3. it was enacted, that after  
18. 24th June 1745, no person should vote for a knight of the shire, (in England, or Wales) "in respect or in right of any messuages, lands, or tenements, which have not been charged or assessed towards some aid granted, or hereafter to be granted to his Majesty, his heirs, or successors, by a land-tax in Great Britain, twelve calendar months next before such election." The stat. 20 G. 3. c. 17. f. 1. without  
20 G. 3. c. 17. noticing any of the prior acts, further than to observe that they are difficult to be carried into execution, enacts, that after 1st January 1781, no person shall vote for a knight of the shire, (in England or Wales) in respect of any messuages, lands, or tenements, which have not, for six calendar months next before such election, been charged or assessed towards some aid granted or to be granted to his Majesty, his heirs or successors, by a land-tax, (in case any such aid be then granted and assessable,) in the name of the person or persons who shall claim to vote at such election for or in respect of any such messuages, lands, or tenements, or in the name of his or their tenant or tenants, actually occupying the same as tenant or tenants of the owner or landlord thereof." The stat. 30 G. 3. c. 35. reciting the above-mentioned clause, and that "the form of assessment prescribed by the said act (20 G. 3.) and thereunto annexed, denotes that the names, both of the proprietor, and of the occupier, ought to be specified; and doubts have arisen, whether, if such form be not strictly pursued, the suffrage of the person claiming to vote be admissible;" requires only (sect. 1.) that the freehold shall have been assessed for 6 calendar months before the election in the name of the person claiming to vote "although the name of the tenant or tenants actually occupying such messuages, lands, or tenements, shall not be inserted in such assessment, according to the  
form
- 30 G. 3. c. 35.

form of assessment to the said first recited act annexed ;" or, (sect. 2.) " in the name of a tenant or tenants actually occupying the same at the time of such assessment being made, although the name of the person so claiming to vote &c. shall not be inserted in the assessment, according to the form of the assessment to the said first recited act annexed."

In this case, the election was held in July 1802 : the assessment made last before the election, having been made within the 6 months, (25th March, 1802) of course, furnished no evidence as to the assessment of the voter's property for the time required by the law : recourse was therefore had to the assessment of the preceding year, which was made from 25th March, 1801. Not one instance occurred of a freeholder having procured his own or his tenant's name to be inserted in the rate, by the mode of appeal pointed out by st. 20 G. 3. c. 17. s. 3. It very soon became a question, whether the statute 30 G. 3. c. 35. applied to cases where a different proprietor, or occupier, appeared upon the poll, from those named in the assessment. It was suggested by one of the learned counsel for the petitioner, that the statute was meant to extend to such cases only, where one of the two (namely the proprietor, or occupier) was rightly named, and the other wholly omitted in the assessment ; and not to those cases, where one of the two was rightly named, but where the name of the other appeared upon the assessment to be different from that given in at the poll ; as for instance, where the occupier being right, but a different person being named in the assessment as the proprietor, the strongest suspicion arose, that the occupier was rated, not as tenant to the voter, but to another person. But after some discussion, the construction contended for by the counsel for the sitting member was adopted, and the following rule was entered upon the minutes of the committee by the agreement of both parties, namely, " That if either the name of the owner, as owner, or that of the occupier, as occupier, of the freehold voted for, appears rightly upon the assessment ; that is, if either be right, although the other be wrong, such voter shall be

Assessment:  
March 1802.

Assessment  
in the name  
of a different  
proprietor or  
occupier.

deemed rightly assessed." This resolution was made 25th February, in the case of Thomas Garman. He had at the poll given in as his occupier John Garman. On the assessment, Ann Garman appeared as the proprietor, and John Garman as the occupier. His vote was declared good.

The same person differently described.

It frequently happened, that the owner or tenant was assessed by a name differing from that which appeared on the poll (although the assessment was really meant to be made upon the same person) either by the christian name being different, or omitted, or put with the initials only, or by

"It may also assist the reader, to lay before him a short account of the principles upon which the Bedfordshire, Cricklade, and Buckinghamshire committees (in 1785) are reported by Mr. Luder to have proceeded with respect to the question of assessment. He is referred for a fuller exposition of them to Mr. Luder's second volume, and to the arrangement of the law upon the same subject, by Mr. Serjt. Heywood, in his first volume, p. 112 to 145. It will be recollected that the stat. 30 G. 3. c. 35. had not then been passed. See 1 Heyw. Pref.

The Bedfordshire committee resolved, (upon stat. 20 G. 3. c. 17.) "That it is not necessary that the form of the schedule should be strictly complied with;" "that the owner's name must appear on the assessment, either as the person assessed, or as owner of the land for which the tenant is assessed." p. 497. From this rule, however, they made some exceptions, in the case of persons, who had freeholds arising from certain salaries issuing from lands vested in trustees for that purpose, and who were held not to have the power of procuring their names to be inserted in the assessment upon appeal. p. 497. & seq.

The Cricklade committee resolved, "That such freeholders as were assessed for the premises in respect of which they claimed to vote, either in their own names, or in the names of their

tenants actually occupying the same as tenants of such freeholders, were entitled to vote at the late election for the borough of Cricklade." Under this resolution, they struck off the votes where the tenant was rightly named in the assessment, but the name of a different proprietor was inserted. See p. 536.

The Buckinghamshire committee resolved, "That it is not necessary that the name of the owner should appear upon the rate." No case occurred to afford an opportunity for the application of this rule. See 2 Lud. p. 539. In cases where the voter was assessed as owner, the Bedfordshire committee resolved, "that the omission or misstatement of the tenant's name in the assessment, should not be deemed a valid objection to the owner's vote." 2 Lud. 514. The Cricklade committee resolved also, that the voter should be considered as duly assessed *prima facie*, so as to require evidence to impeach the poll and assessment from the party objecting, in the cases where the voter had given in one tenant, and was assessed in the name of another. 2 Lud. 515. The Buckinghamshire committee, (p. 516.) resolved, 1. that the party supporting the vote should be put on proof of the freehold of the voter, where only the same occupier's name as is on the poll, appears on the rate. 2. That when the christian name only of the voter is different in the rate, and poll, the party is not to be put on the proof.

the



the surname being differently spelt, or sometimes by the person himself being described not by his name, but by his office, situation, or some other character. 25th February. Where the voter on the poll was Joseph Taten, and the proprietor on the assessment was Chas. Tatem, the committee determined "that where the christian name of a voter varies on the poll and on the assessment books, the party who supports the validity of the vote shall be called on to justify such variation". In this case no such evidence was given, and the vote was declared bad: in other cases, the variation was justified, by calling the assessor, or collector of the land-tax, to declare that the voter was the person whom they had actually meant to assess, and that they had mistaken his name: as in the case of Richard Goodwin, (6th and 7th March) who was assessed by the name of Wm. Goodwin: the assessor proved that his real name was Richard, and that Richard had been assessed, by a mistake, in the name of William. Where no christian name, or the initials only appeared on the assessment, the party supporting the vote were called upon to supply the deficiency in such assessment. This resolution took place in the case of Hayman Dyson (25th February); in the assessment, Susan Dyson, Ch. and H. Dyson were rated as occupiers; and the assessor having proved that Hayman was meant by H. the vote was determined to be good. With regard to surnames, which varied on the poll and in the assessment, the committee gave their opinion upon each particular case, whether they should be considered as different names, or the same name differently spelt, and taken down by the poll clerk according to his apprehension of it as it was pronounced to him by the voter. (Sometimes from the manner in which the name was

Different christian name.

No christian name, or initials only.

Surname mis-spelt.

\* In all cases, arising from the assessments, the party supporting the vote was called upon to get rid of the objection.

\* The Bedfordshire committee seem to have proceeded by the same rules. See 2 Lud. p. 517. 520. 523. The Gloucestershire committee resolved, "that where there is any doubt whe-

ther a particular estate is included as assessed under any particular article in the rate, the parties are at liberty to give evidence in explanation of the rates, to induce the committee to believe that it is included or otherwise in the assessment." And they admitted the assessor to give evidence of his intentions in making the rate, p. 57. and see p. 164.

written in the poll, or the assessment, it became difficult to say what letters were intended to be made use of). Many cases of this sort daily occurred, but a few instances will be sufficient here; Colten was taken to stand for Coulton, the real name of the voter, or his occupier, and the name upon the assessment: Hoskins for Hoskinson, Myers for Swires, Ridgeway for Ridgley, Tacker for Decca; it being proved, that there was no person of the name described on the poll, in the occupation of, or interested in the premises. See *ante*, p. 52. and p. 62.

25th February. John Williams. In the original assessment, "Rev. Mr. Williamson." In one of the copies delivered out by the clerk of the peace, the same name appeared; in another, "Rev. Mr. Williams." By st. 20 G. 3. c. 17. s. 13. every copy so delivered out, is made evidence. The committee determined to abide by that in which the voter was rightly named\*. It was also agreed that it was incumbent on the party who supported the vote, to call the assessor to prove that he meant to assess John Williams, by the name of the Rev. Mr. Williams.

30th June. Thomas Francis Jennings. In the assessment, Thomas Jennings. The committee required proof that the person named in the assessment was the voter. *Contrà* 2 Lud. 516.

The title of the voter to be shewn, where a different proprietor is assessed.

In the course of their proceeding, the committee found many cases, where, although the estate voted for was in fact rated in the name of the tenant given in at the poll, some other person was assessed as the owner of it. This led them to suspect that in several of them, frauds had been committed, by strangers offering themselves to vote for premises, to which they had no title. At length, they made a rule, that in such cases, the title of the voter should be proved†. This rule was first adopted in the case of William

\* See the determination 2 Lud. 527. where the copy given to the clerk of the peace, and the duplicate in the hands of the commissioners being equally authentic, the committee adopted that which supported the vote.

† It should appear that this rule rather proceeded from the desire of the committee to detect fraud in suspicious cases, or from their opinion, that without such proof of the voter's title, the land assessed was not sufficiently identified with

liam Biddulph, (7th March) who had voted for premises assessed in the name of the Coopers' company, as proprietors. The same point was three days afterwards again discussed in the case of Thomas Noble, who had named himself as the occupier of the freehold. The premises were assessed in his name as occupier, but in the name of another person as proprietor. The committee determined, that, as it appeared from the face of the assessment that another person was the proprietor, it was incumbent on those who supported the vote, to contradict that presumption, and to prove that the voter was the proprietor. No such proof being given, the vote was declared bad.

17th March. Robert Hill. Occupier, "Self." Assessed in the name of Lord Hinchinbroke, as proprietor, and of Robert Hill, as occupier. It was proved that Lord H. had parted with the premises in 1796, and that the voter had been in possession since 1800. The objection of non-assessment was the only one relied upon by the petitioner, and the only one named by him against this voter, in the list delivered by order of the House. The committee held it necessary for the party supporting the vote, to shew a freehold title in the voter, for 12 months before the election: although it was contended, in support of the vote, that the presumption arising from the insertion of Lord H.'s name upon the poll, had been done away, and that the possession of the voter should be considered as *prima facie* evidence of a freehold title. The vote was determined to be bad.

Although the proprietor on the poll be shewn to have no title.

Where the name of the tenant being the same on the poll, and on the assessment, the name of the proprietor was not inconsistent with the name of the voter on the poll: as, A. B. the voter; assessed, "late C. D." or "Mr. B." &c. the committee required no evidence of the title, or of the identity of the proprietor.

Voter's name consistent with that of the owner assessed.

In the case of William Stunnell, (19th March), the committee determined, "that when an occupier appears on the

Change of occupation between

with the land voted for, than from the principle (mentioned *ante*, p. 47.) of taking notice of new objections disclosed by the evidence; for in general, the entries in the books of assessment were

held not to be admissible as evidence in support of any other objection, than that of non-assessment. N. B. In these cases, the production of the voter's title-deeds was required. See *post*.

making the  
assessment  
and the elec-  
tion.

No proprie-  
tor assessed.

Voter as-  
sessed as  
proprietor,  
with a dif-  
ferent ten-  
ant.

Occupier  
assessed  
without a  
christian  
name, or by  
its initial  
letter.

Name of  
occupier on  
the poll.

assessment of 1801, who is not the tenant given in at the poll, it is necessary to prove that such person was actually the tenant at the time such assessment was made." And on 9th April, they determined, "that the foregoing rule applied only to such cases, where no name appeared on the assessment of 1801 as proprietor, and where the name of the occupier on such assessment differed from the name of the tenant on the poll." Where there was no proprietor assessed, and the occupier on the poll and on the assessment were the same, no further evidence was required. Where the name of the proprietor on the poll and on the assessment was the same, and the name of the tenant differed, no further evidence was required. Where no proprietor was assessed, and the occupier's christian name was omitted, or put with initials only, evidence was required to shew that the christian name of the occupier assessed, was the same with that of the occupier named on the poll; (see *ante*, p. 67.) but if the name was at full length on the assessment, and put with initials on the poll, no explanation was held necessary.

Not assessed as described on the poll, in respect of the situation of the freehold.

Freehold de-  
scribed in  
one street;  
assessed in  
another.

29th February. James Knowles. Situation of the freehold on the poll, "Richmond Street." Assessed, "on the west side of the Bowl and Pin;" which is the description of a row of houses, near Richmond Street, and in the same parish. It was contended, that the freehold having been described to be in a place situate in the same parish, it was sufficient: but the committee held the description on the poll not to agree sufficiently with the assessment, and determined the vote to be bad<sup>x</sup>.

<sup>x</sup> The Bedfordshire committee disallowed the vote, where the freehold was described in one parish, and assessed in another. 2 Lud. 509. Where the voter described his freehold in Leigh, and it appeared that the name of the parish was Leigh and Cleverton; that the assessment was in two divisions, and

that the voter's freehold was assessed in Cleverton; the Cricklade committee held the vote to be good. 2 Lud. 512. But where the parish, consisting of four tithings, the voter described his freehold in one of them, and it appeared to be assessed in another, the vote was held bad. p. 512.

# MIDDLESEX.

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27th February. W. F. Green. Situation of freehold on the poll, "Edgware." Assessed in Hendon. The vote was declared bad. Different parish.

5th March. James Arding. Situation of freehold on the poll, "Gray's Inn Lane." Assessed in Chad's Row. Chad's Row is a continuation of Gray's Inn Lane, and is sometimes called by the same name. The vote was allowed. A street called by both names.

— March. Thomas Baxter. Situation of freehold, "Whitechapel Road." Assessed in Whitechapel High Street: the road is a continuation of the street, but it is numbered separately, and never called by the same name. The committee declared the vote to be bad. Different street.

20th March. Laurence Colson. Situation of freehold, "Chandos Street." Assessed, in Ship Yard. There are only three houses in this yard, which goes out of Chandos Street. They are seldom called by the name of Ship Yard, but generally Chandos Street. The vote was allowed. Called by both names.

18th April. John Roberts. Situation of freehold, "Harrow." Assessed in Pinner, which is a hamlet of the parish of Harrow, but maintains its own poor separately, has a separate ballot for the militia, separate churchwardens, and a separate land-tax assessment. The committee declared the vote to be bad. Described in the parish; assessed in a hamlet of the parish.

18th April. Thomas Seager. Situation of freehold on the poll, "Harrow." Assessed in Kenton: which is a division of the parish of Harrow, but did not appear, by the evidence given, to be distinguished from the parish in general, in any of the particulars mentioned in the last case. The committee determined the vote to be good. Described in the parish; assessed in a particular division.

Not assessed as described on the poll, in respect of the nature of the freehold.

19th March. Thomas Lucas. Nature of the freehold on the poll, "Ground." Assessed for a house. The committee disallowed the vote.

The Cricklade committee determined, "that the voter's being rated on the assessment of some or one of the things, part of the mother parish of

Highworth, was sufficient;" he having described his freehold to be situated in the mother parish. 2 Lud. 511.

**Votes for an office—assessment for a house belonging to it.**

19th April. William Ramsden. Nature of freehold on the poll, "Master of the Charter-house." He was not assessed for his office, but for a house which he held by virtue of his office; and he had redeemed the land-tax in respect of that house, some time before the election. The contract of redemption, being put in, appeared to be for an house. The appointment of the voter to his office was proved. It was contended, that the vote was bad, because the office, in right of which he voted, had never been assessed; and that the assessment for the premises, which he held by virtue of his office, and the redemption of the land-tax in respect thereof, would not avail him<sup>2</sup>, since it was not for those premises, but for the office itself, that he had voted. To this argument it was answered, first, that it was not necessary that he should be assessed for his office; and it was said that this had been decided in the case of Nathaniel Berry<sup>1</sup>. But the chairman remarked, that the committee had in that case laid down no such rule; but had only prescribed the mode of proceeding in cases, where the office was admitted by the counsel on each side, to be of such a nature as not to require assessment. And the counsel on the other side in reply, adverted to the case of an exigenter, who had voted in right of his office, and to whom the objection was made, that he had not been assessed in respect of it: which was answered, by shewing the assessment. The committee, after some deliberation, determined, "that W. Ramsden, having described himself as master of the Charter-house on the poll, and it being shewn that the land-tax of his house was redeemed, is a good vote." The counsel who objected to the vote, requested of the chairman to be informed, whether the committee had made this decision, upon the ground that it was not necessary that the office should be assessed: to which the chairman answered in the negative, and intimated the opinion of the committee to be, that the voter, having described himself master of the Charter-house, was entitled to vote for his house, which

<sup>1</sup> See *post*, exemption from assess.  
must in the case of land-tax redeemed.

<sup>2</sup> See *post*, exemption from assessment,  
in the case of offices.

be possessed as such master, and the land-tax for which had been redeemed.

30th June. Richard Friday. He voted for land in his own occupation. The assessment did not distinguish what the nature of the property was; as, whether it consisted of a house, or land, &c. The assessor was asked, whether it was not an house; but the committee would not permit the question to be put to him; and the chairman said, that the assessors had only been allowed to explain the assessment, in cases where the entry thereon was ambiguous, or where it appeared to be inconsistent with the account given by the voter: here, there was no inconsistency or ambiguity<sup>b</sup>, the nature of the freehold being wholly omitted in the assessment. The vote was determined to be good.

Nature of freehold not distinguished in the assessment.

## 2. Not duly assessed.

The committee, as has been already observed, held an assessment in the name either of the owner, or of the tenant, to be necessary. In the case of James Dell, (27th February) no assessment either of the voter or tenant was found. It was proposed to prove the freehold assessed, by putting in the receipts given to the tenant of the land, who had actually paid the rate; and it was contended that this was a virtual rating; and that a virtual rating was sufficient: but the committee decided, that this was not sufficient evidence to establish the assessment.

Mere payment of the land-tax, not sufficient.

## Not duly assessed in the name of the owner<sup>c</sup>.

27th February. Richard Pepley. In the assessment, "late Gosport" was inserted in the column of proprietors: no tenant's name appeared. The committee determined the vote to be bad<sup>d</sup>.

Virtual rating insufficient.

27th.

<sup>b</sup> See ante, p. 67.

<sup>c</sup> It will be recollected, according to the general rules laid down *ante*, p. 70. that in this class of cases, no occupier, or a wrong occupier, was assessed.

<sup>d</sup> So the assessment of land in the name of "Tyson's heirs," was held

insufficient. See *post*. vote of David Jennings, under the head of exemptions from assessment in the case of rent charges, &c. The Bedfordshire committee held an assessment to be bad, in the name (as proprietor) of "Billington Town land:" "heirs of Thomas Folkey;

S. P. owner  
rated under  
the word  
"Co."

27th February. Charles Blackwell. Occupier on the poll, "self." The freehold was assessed in the names of "Mary Boddimead and Co.," as proprietors. The assessor declared, that under the word "Co." he understood the voter to be comprised, whom he considered to be the partner of Mary Boddimead. The counsel against the vote objected, 1. to the intention of the assessor being admitted as evidence to explain the assessment: 2. to any explanatory evidence being given of the word "Co.," since, as they contended, it could only amount to a description of the owner, whereas it was required that he should be assessed by his name. The committee decided the vote to be bad. See p. 78.

Proprietor  
of a share of  
the New  
River.

1st March. George Marshall. He voted for a share in the New River. The assessment was in the name of "the proprietors of the New River." The committee determined that the assessment of the company was a good assessment for the shares. It is to be observed, that by statute, a particular mode is provided for paying the land-tax assessed on this property, from the general fund.

Description  
of the owner  
as vicar of  
S. sufficient.

2d July. Rev. W. Aubrey Phelps. In the assessment, "the vicar of Stanwell" was named as proprietor of the

Folsey; "Dunstable charity; late Franklin's." But they allowed the vote, where the entry was, "late White's, in dispute." 2 Lud. p. 521. The Gloucestershire committee held, that by st. 18 G. 2. a person who had purchased, 12 months before the election, a freehold estate of the value of 40s. *per ann.* at the time of the purchase, for which he did not appear particularly rated to the land-tax, but to have been included in a general assessment imposed on the vendor (comprising other land), was entitled to vote, p. 55. But (p. 89) they held that a person had no right to vote, who had purchased an estate in land of the annual value of 20s. at the time of such purchase, on which he had since erected a messuage of the annual value of 6l. which land, at the time of the

purchase, was included as rated in the estate of the seller, who continued to pay the same rate as before the separation, but no additional assessment imposed on the estate for the increased value by building the said messuage." The reader will however bear in mind, both with respect to these, and all other cases cited, upon the subject of assessment, from the Gloucestershire case, that the law which then prevailed, arose from the st. 18 G. 2. c. 18. which required the freehold to be rated, but not in the name either of the owner, or his tenant. In one case, they resolved, that, where the tenant's name appeared on the rate, for land, "late Hollister's," it was incumbent upon the party supporting the vote, to prove, that it was the same land for which the voter had polled. p. 26.

freehold;



freehold ; which was considered as a sufficient assessment in the name of the proprietor ; the voter being proved to be the vicar.

— March. Francis Ireland. In the occupier's column, the name F. Ireland was found, with the letters "Ld" added. The assessor deposed, that "Ld" stood for landlord ; and that these letters had been inserted before the allowance of the assessment. The vote was determined to be good.

Owner's name in the tenant's column, and stated there to be landlord.

21st April. John Cotchet. In the assessment, no proprietor's name appeared in the proper column ; but the voter's name was inserted in the column of occupiers. The premises were in fact occupied by another ; but the assessor had named the voter only, because he had always received the land-tax from him. The committee held the vote to be bad.

Owner assessed as occupier.

19th March. Edward Fawill. Occupier on the poll, "Joseph Cox." Occupier assessed, "Edward Fawill." The assessor said, that Fawill always paid the rate, and that Cox was Fawill's servant. It was observed, against the vote, that if Fawill was the occupier he should have described himself as such on the poll ; if Cox was the occupier, he should have been assessed as such. The vote was declared bad.

Same point.

19th March. William Kirkby voted for chambers in Staples Inn, which he held for life of the society of that Inn. The society were assessed as proprietors, and the voter as the occupier. The voter did not occupy the chambers himself ; but it appeared, from the evidence of the assessor, that throughout the whole of the assessment for this Inn the society were named as the proprietors, and those who held chambers under them, whether for life, or otherwise, were named as occupiers. In support of the vote, the case of Francis Ireland was referred to, and it was further contended, that here, in fact, both the parties named in the assessment might be considered as being rated as proprietors ; viz. the one of the legal, the other, of the equitable estate ; or, the one, as owners of the fee ; the other, of a life interest ; and that the committee would not consider themselves bound by the form of the assessment, in this case, where the practice

Same point.

tice

tice had been explained. But the committee held the assessment to be insufficient; and they distinguished this case from that of Ireland, by observing, that the explanation there, appeared upon the face of the assessment itself; whereas here, nothing appeared, except from the evidence of the assessor, to shew that the voter was not assessed as occupier: and they determined the vote to be bad.

Assessment  
of the voter's  
wife, by her  
maiden  
name.

29th February. James Luced. In the assessment, "Mary Murray" was assessed as proprietor. Mary Murray had married the voter about five years before the election, and had desired that the assessment of these premises (of which she had been the owner) might continue in her name. The committee determined, "that the name of the wife should not be considered as sufficient on the assessment either as landlord or tenant, but the name of the husband shall be required, in any case, where the parties have been married more than 12 months previous to the election." The vote was declared bad.

Assessment  
in the name  
of the wife,  
bad.

5th March. Richard Edwards. The proprietor assessed was "Ann Edwards." The collector said, that Ann Edwards was the wife of the voter, and that her name had been inserted by a mistake, instead of his. Upon the authority of the preceding case, this vote was also determined to be bad.

Assessment  
in the name  
of the voter's  
joint-  
tenant, bad.

31st May. John Rogers. He was one of two joint-tenants of the freehold. In the assessment, the other was assessed as the proprietor of the estate for which J. R. voted. His vote was disallowed\*. See the vote of Thomas Dickson, *post*. p. 78.

Not duly assessed in the name of the tenant<sup>f</sup>.

Change of  
tenant be-  
tween the  
assessment  
and the  
election.

27th Feb. William Mason. Occupier on the poll, "—— Ginn." In the assessment one Denton was named as the occupier. The assessor proved that Denton was the

\* See a similar determination, in *Lud.* 508.

<sup>f</sup> The reader will recollect that these questions arose, in those cases, where no proprietor was assessed, or where

another person, and not the voter, was assessed as proprietor: and that in the latter case, it was also necessary for the party supporting the vote to prove the voter's title.

occupier when the assessment was made, and that Ginn succeeded him, and was tenant at the time of the election. The vote was allowed.

—March. Richard Smedley. Occupier on the poll, "James Dukea." Occupier assessed, "Elizabeth Young." the assessment was allowed, 7th Oct. 1801. E. Young, who was tenant when the assessment was made, left the premises, 29th September 1801, and they were in fact empty when the rate was allowed. Afterwards the tenant named on the poll entered, and occupied the premises at the time of the election. The committee determined the vote to be good <sup>2</sup>.

Change of tenant between the making, and the allowance of the rate.

19th March. William Twentyman. Occupier on the poll, "self." Occupier assessed, "Mary Wall." The assessor said he believed that the voter had taken possession of the premises before the election; but he not being able to speak positively to that fact, and the name of Mary Wall continuing as occupier in the assessment of 1802, the committee determined the vote to be bad.

Insufficient evidence of a change of tenancy.

2d March. William Wilcox. Occupier on the poll, "Martin Wade." In the column of occupiers on the assessment, "E." was inserted, for "empty," and no proprietor. It was proved that the house was empty, when the assessment in 1801 was made; and that Wade entered at Christmas 1801, and continued to be tenant at the time of the election. It was attempted to support this vote upon the principle, upon which the case of William Mason <sup>a</sup> had been decided, viz. a change of tenancy; or rather, of circumstance; the fact being truly stated in the assessment. But the committee held the assessment to be insufficient, and the vote to be bad; considering the premises not to be assessed at all.

Premises empty at the time of making the assessment.

19th March, Robert White. Occupier on the poll, "James White." In the assessments 1801 and 1802, proprietor, "Duke of Portland;" occupier, "Robert White."

Assessment of a former occupier.

<sup>a</sup> The entries on the assessment were held to refer back to the 25th March, at whatever time the rate had in fact been made, or allowed.

<sup>b</sup> *Supra*, p. 76.

It was proved by the oath of James White, the voter's brother, that he (the witness) had occupied the house for eight years: that before that time the voter had occupied it, and that by inadvertence, the voter's name had continued in the assessment as occupier. It appearing therefore in this case, not that the assessor had mistaken the name of the present tenant, but that he had continued the name of a former tenant, the vote was declared bad.

Tenant assessed as  
"A. B. and  
Co."

— March. John Gibson. Occupier on the poll, "John Gibson." Occupiers assessed, "Prior and Co." A witness proved that John Gibson was one of the partners. But the committee held the assessment to be insufficient, and the vote to be bad. See *sup.* p. 74.

Occupiers assessed under the name of  
"Sharpe's tenants."

24th April. William Sharpe. Occupiers on the poll, "Inmates." Occupiers assessed, "Sharpe's tenants." It was proposed to shew that this was in fact an assessment of Sharpe himself as the occupier; his tenants being weekly lodgers. The collector, however, said that he did not mean to rate Sharpe as the occupier, but those who held under him. In support of the vote, a case was cited, 7th March, where the committee had held an assessment on "Holden for tenants," a sufficient assessment on Holden, as occupier; and the decision of the committee was referred to in p. 60. *ante*, in which they held that a man was not bound to give in his weekly lodgers as occupiers, but that he might, in that case, state the premises to be in his own occupation. But the chairman observed, that the decision referred to, applied only to the description of the occupier on the poll: here, the objection was against the assessment; for it plainly appeared that Sharpe was not assessed as occupier, but that other persons were assessed, who were not named. The vote was determined to be bad.

Assessment in the name of a joint-tenant as occupier, bad.

7th June. Thomas Dickson voted for a house in his own occupation. The freehold was assessed in the name of George Dickson as occupier. It was proved that the two brothers occupied the premises jointly, at the time of the election, and of the assessment; and that they were jointly interested in the estate. The vote was declared bad. See the vote of John Rogers, *ante*, p. 76.

29th June. Joseph Hurlock. Occupiers on the poll, "the Moravian Society." Occupier assented, "John Lewis Wollin, for chapel and burying ground." The Moravian Society are no corporation, but a religious sect. It was proved that the premises in question were made use of by them for religious purposes: and were under the care of one Curtis, the servant of the society, who resided there. Mr. Wollin was a member of the society. It was insisted, that this was not a sufficient assentment of the premises in the name of the tenant: if the occupier *de facto* were looked to, Curtis should have been named as occupier; if the legal occupation, or tenancy, the society should have been named, and not Mr. Wollin, who was only an individual member of the society, and had no private, or several interest in the premises. In defence of the vote it was said that the ground being taken by a society of many persons, any one of them might be said to be an occupier; that if the name of one was not sufficient, it would be necessary to insert the names of the whole number, since they had no corporate name; but that this had never been required, either in the case of proprietors, or of occupiers. The committee decided the vote to be bad.

Not duly assented, from some irregularity in the form, &c. of the assentment<sup>1</sup>.

2d March. Edward Greenhill. It appeared that the books of the assentment for the liberty of the Rolls, and extra-parochial parts of Lincoln's Inn (in which the voter's freehold was situate) had been very irregularly kept. The same book had been made to serve for two or three years, by making alterations in the names, &c. with red ink, and by procuring a fresh signature from the commissioners, the page being torn off, upon which the signature for the year preceding had been made. Consequently, no signature appeared for the rate of the year 1801. The rate for the year

<sup>1</sup> For the form of the assentment the 17. 38 G. 3. c. 5. 38 G. 3. c. 60. by reader is referred to stats. 20 G. 3. c. which the land-tax was made perpetual.

1802, was signed and sealed by two commissioners only\*: nor had any duplicate of that assessment been returned to the clerk of the peace<sup>1</sup>. But the collector having deposed, that in fact the rate had been made, allowed, and collected, for the year 1801, the committee determined, that as the books of assessment produced had been acted on as valid, and were the only evidence of assessment, they should be received in evidence.

Rate in  
1801 col-  
lected by  
the assess-  
ment of  
1800.

23d June. Timothy Tirrell voted for chambers in Lyons Inn. To prove the assessment, the collector produced a paper purporting to be an assessment for 1800, by which the witness said he had collected the land-tax, not only for that year, but for the years 1801, 1802, and 1803: and that no other had been made. It was objected, that this paper could not be received in evidence as an assessment for 1801: but the committee determined, "that as the paper produced has been acted upon as the assessment of 1801, and is the only evidence of assessment in that year, it shall be received in evidence." The vote was determined to be good.

Assessments  
out of the  
county re-  
ceived,  
where the  
boundary  
was dis-  
puted.

9th May. Thomas Lamb. He voted for premises in Farnival's Inn court, which stand upon a disputed boundary between the county of Middlesex, and the city of London; but are assessed in the latter. The committee were of opinion, that in favour of the franchise, they might be considered to be within the county, unless the contrary were proved: upon which it was objected, that the London assessments could not be received in evidence of the premises being duly assessed: but the committee resolved to receive the evidence, and determined the vote to be good.

Name in-  
serted by the  
collector as.

28th March. Charles Mann voted for land in Uxbridge in his own occupation. It appeared, that in the assessment

\* The 38 G. 3. c. 5. s. 8. requires that each of the three duplicates of the assessment shall be signed and sealed by three or more commissioners. Where it appeared that the custom had been for the clerk to make out the copies, and deliver them out without the

signature of the commissioners, the Gloucestershire committee received a duplicate, without such signature, in evidence. p. 180.

<sup>1</sup> As it is required by 20 G. 3. c. 17. s. 3.

for 1801 the name of Mr. Naylor appeared as occupier; but that after the signing of the assessment by the commissioners the name of Mr. Mann was inserted by the collector, and that the land-tax for the year 1801 had also been paid by Mr. Mann. Mr. M. had purchased the premises in 1801, and was regularly assessed for them in 1802. The committee determined the vote to be bad.

ter the al-  
lowance by  
the commis-  
sioners.

### 3. Of exemptions from assessment; in the case of rent-charges, and fee-farm rents.

The general enactment of the stat. 10 Ann. c. 23. f. 2. Statutes. has already been stated, p. 63. By stat. 12 Ann. c. 5. it was declared, that the former act should not be construed "to restrain any person from voting for a knight of the shire in respect or in right of any *rents*, tithes, or other incorporeal inheritances, or any messuages or lands in extra-parochial places, or any chambers in the inns of court, or inns of chancery, or any messuages or seats belonging to any offices, in regard or by reason that the same have not usually been, or shall not be charged or assessed to all or any the public taxes, church rates, and parish duties, as mentioned in the above recited act," (10 Ann.)

By stat. 18 G. 2. c. 18. the clause 10 Ann. c. 23. f. 2. was repealed, and it was enacted, that no person should vote in right of any "messuages, lands, or tenements," which had not been assessed to the land-tax a year before the election: by f. 4. an exemption was made of persons voting "in respect or in right of any *rents*," or any chambers in the inns of court, or inns of chancery, or any messuages or seats belonging to any offices, &c. The statute 3 G. 3. c. 24. St. 3 G. 3. c. 24. prohibits any person from voting "for or in respect of any *annuity or rent-charge*," unless it shall have been entered with the clerk of the peace at least 12 calendar months before the first day of the election. By stat. 20 G. 3. c. 17. which fixes the time of assessment to six calendar months next before such election, it is provided (f. 2.) that this act shall not extend, "to *annuities or fee-farm rents* (duly registered) issuing out of any messuages, lands, or tenements, rated or assessed as aforesaid."

38 G. 3.  
c. 5.

By stat. 38 G. 3. c. 5. f. 5. where lands, &c. are encumbered with rent-charges, annuities, fee-farm rents, rent-services, or other rents, thereupon reserved or charged, above 20s. *per annum*, the owner of the land, &c. may deduct therefrom a proportionable part of the land-tax. And by f. 24. it is enacted, "that all fee-farm rents, and all other rents, payments, sum and sums of money, and annuities, issuing out of or payable for any lands, shall be liable towards the payment of every sum by this act to be taxed and levied: and all such tenants are hereby directed and authorized to pay them proportionably, according to the rates and assessments by this act directed and appointed," &c.

The registration of a rent-charge, and the assessment of the lands, must be proved by the party supporting the vote.

5th March. Charles Abbott. In this case, the committee determined, that when a voter is objected to, upon the ground of non-assessment to the land-tax, and an exemption from such assessment is claimed on the score of rent-charge, the party maintaining the vote shall be called upon to prove that the rent-charge is duly registered, and that the estate from which it issues is duly rated and assessed. Under this rule, the vote of Mr. Dudley North, who had voted for a rent-charge, which was proved to have been registered, was set aside, as it did not appear that the lands from which it issued were assessed.

Fee-farm rents must be registered, or assessed.

24th May. David Jennings, voted for a fee-farm rent issuing out of the manor of Hackney, payable by the Lord of that manor. It was objected against him, 1. that his freehold was not duly assessed; 2. that it was not duly registered. On the assessment, "Tyson's heirs" were named, as the proprietors of the manor and no occupier; the name of the occupiers of the respective lands were placed in their proper column. The manor was at the time of the election, and long before, vested in trustees, for Mr. Tyson. The voter had filled up the column of occupiers on the poll, with the name of "Mr. Tyson." His title to the fee-farm rent, and his possession of it, were fully proved; but there was no proof that it had been registered; and it was scarcely contended, that the assessment in the name of "Tyson's heirs," of the estate from which it issued, could be considered as sufficient, since the committee had in many cases, held



held similar descriptions to be bad <sup>a</sup>. But it was contended in support of the vote, that it was neither necessary that the rent should be registered, nor that the land from which it issued should be assessed, for the following reasons :

The statute 3 G. 3. c. 24. s. 3. mentions "annuities and rent-charges;" the st. 20 G. 3. c. 17. s. 2. has the words "annuities and fee-farm rents;" but it is probable, that the latter word was put in by a mistake, instead of the word "rent-charges," since it is clear that this act meant to embrace the same objects as the former. Fee-farm rents are not within the spirit of either statute: The object of both is (as appears from the preamble of st. 3 G. 3.) to prevent fraudulent qualifications: but it is almost impossible, that a fee-farm rent, from the nature of it, can be made the subject of a fraudulent qualification, for it is a rent reserved to the grantor, at the time that the estate itself is granted out; whereas a rent-charge is granted out of the estate. A fee-farm rent cannot be distrained for, unless a special power of distress be reserved or granted: whereas a power of distress is incident to every rent-charge. See *Bradbury v. Wright*, Douglas's Rep. in K. B. 627. If the st. 20 G. 3. c. 17. be held to apply to fee-farm rents, rent-charges must be considered not to fall within it; for they are not named there. Fee-farm rents neither are, nor can be, registered, according to the provisions of the st. 3 G. 3. for by the 3d section of the act, the memorial is required to be "under the hand and seal of the *grantor* or *grantors*, and attested by two witnesses, one whereof to be one of the witnesses to the execution of such grant;" whereas no one can with propriety be called the *grantor* of a fee-farm rent; since, as it has already been observed, such a rent is not granted, but reserved <sup>o</sup>.

On the other hand it was contended, that by the general provisions of the statute, every freehold must be assessed: the exception is made in favour of certain freeholds, which are registered in the manner prescribed. Therefore, if this

<sup>a</sup> See *ante*, p. 73.

<sup>o</sup> See *supra*.

<sup>o</sup> See 2 Lud. 504. and see *Bulpet v. K.* 18.

Clarke, 1 Bos. and Pull. (New Reports)  
60. Com. Dig. Rent. C. 9. Pleading, 3

property be not considered as a rent-charge, which must be registered, it falls under the general description of a tenement, which should be assessed. In either view of the case, the vote is bad; and in the former, it is liable to the additional objection, of the land from which the rent issues not being assessed. The words of the 20 G. 3. c. 17. are express, and afford a decisive answer to all the distinctions made on the other side; strictly confining the exemption to annuities, and fee-farm rents, duly registered; which words admit but of one construction. With respect to the objection arising from the form of registration prescribed by the act, the person to whom the land is granted may with sufficient propriety be said to be the grantor, since he is bound to pay the rent. The committee decided the vote to be bad.<sup>p</sup>

<sup>p</sup> The following are the cases relative to the present subject, that are to be met with in other books. Gloucestershire, p. 58. John Smith. "Objection, reserved rent not registered, As neither reserved nor fee-farm rents are mentioned in the act for registering annuities, the committee resolved, *nem. con.* that a reserved or fee-farm rent need not be registered under the act for registering annuities: and see p. 106. *ib.* In the case of the Rev. John Jones, p. 41, who is said to have voted for a payment of 20l. a year, in lieu of tithes, the committee negatived the motion, that he "standing on the poll as voting for a salary issuing out of the great tithes, is obliged to register the same under the act for registering annuities, or rent-charges." P. 127. Samuel Harrington. "One Merryman pays from his estate a fee-farm rent of 5l. *per ann.* to the voter; it formerly was paid to Dee. Dee bequeathed it to the voter. It was contended, that an annuity coming to the voter by will, and not by grant, does not require to be registered, as a right cannot be taken away in an act of parliament, but by express words.

The committee resolved, "that the annuity for which S. H. voted, and which devolved to him in 1762 by the will of John Dee, does not require to be registered." In the case of Ph. Turner, (Bedfordsh. 2 Lud. 431) it was held that the vote of a schoolmaster for a rent-charge, issuing out of lands settled upon the rector of the parish, (by whom the appointment of the voter had been made) was good, although it had neither been assessed, nor registered; the benefice itself being duly assessed. The reader will remember that the Gloucestershire committee sat before the 20 G. 3. (in 1777); the Bedfordshire after, (in 1785) See Simeon, 71. 1 Heyw. 153, 154, 155. 2 Lud. 500. 504, 505.

And where the vicar received a stipend of 10l. a-year from the impropiator of the great tithes, the committee allowed his vote, although he was not assessed for the stipend; the impropiator being assessed for the tithes: for it was said, that there was no means by which the vicar could get his name inserted in the rate. 2 Lud. 508. and see p. 506.

It is not quite clear from this decision, whether the committee were of opinion that a fee-farm rent should be assessed, or registered, or that it was only necessary that the land from which it issued should be assessed, and that in this case, the land was not assessed; for it is probable, that under their former decisions, "Tyfon's heirs" would not have been considered as a sufficient description of the proprietor.

But in the case of John Lee Bennet, (2d July) who voted for a fee-farm rent issuing out of land of Sir W. Gibbons, which land was duly assessed in the name of Sir W. G. as the proprietor, the rent itself being neither assessed nor registered, the committee determined the vote to be bad, and declared their opinion to be, that the word fee-farm rent had been used in the st. 20 G. 3. by mistake; but that the enactment of the statute was so positive, that they felt themselves bound by it; and that as the law now stands, either the freehold itself for which the vote is given, must be assessed; or it must be registered, in the shape of an annuity or rent-charge; the land out of which it issues being likewise assessed.

Fee-farm  
rent must be  
registered, if  
not assessed.

Of exemptions from assessment; in the case of land-tax redeemed or purchased.

By st. 38 G. 3. c. 60. the land-tax was made perpetual. Statutes. By the same statute, provisions were also made for the redemption of it either by the possessors of the land charged, or the purchase by others. Several other acts were afterwards passed for the purpose of altering or explaining those provisions. They were finally consolidated by st. 42 G. 3. c. 116. and by s. 200. of that statute it is enacted, that persons claiming to vote for premises, the land-tax whereon has been redeemed, &c. shall be entitled to vote, "without being compelled to shew that such messuages, lands, or tenements, have been assessed to the land-tax, upon proving to the satisfaction of the returning officer, on oath, or otherwise, that such land-tax hath at any time previously to such election been redeemed or purchased, and the said messuages, lands, or tenements, become exonerated therefrom."

Name of the  
purchaser  
differing  
from that of  
the voter.

The questions that arose during the trial, relative to this subject, were chiefly upon the proof of the identity of the premises exonerated, and those voted for: and where upon the contract of redemption being produced, the name of the purchaser appeared to be different from that of the voter on the poll, the committee required proof of the title of the voter to the freehold; but it was held, that the variance of the tenant on the poll, and the occupier described on the contract, was immaterial: provided the identity of the premises were sufficiently proved. The committee in these decisions, did not proceed upon any reference to the assessment act, but upon the principle, that in the former case, the party defending, by his own evidence, had raised a suspicion against the voter. See *ante*, p. 68. *in not*.

23 April.

Insufficient  
proof of  
identity of  
the pre-  
mises.

13th March. Christopher Ridsdale. Occupier on the poll, "Christopher Ridsdale;" freehold, "a house, situate in Patrick Square." The freehold had been last assessed in the name of Sarah Ridsdale, as occupier. A certificate of a contract of redemption was produced, by Christopher Ridsdale, of a house in Patrick Square, in the occupation of Nathan Coward: and no other evidence was produced, to shew that this was the house voted for. The committee held this to be insufficient proof of the identity of the premises.

Assessment  
of a different  
proprietor  
recited by  
the contract.

29th March. George Parkinson. Occupier on the poll, " — Malim." From the contract of redemption, made in 1799, by the voter, by a claim of preference, it appeared that the lands had been assessed in 1798, in the name of William Young, as proprietor, and of Wentworth Malim, as occupier. A conveyance was shewn from Lord Tyrconnell and others to the voter in fee; but no title was derived from William Young, whose name appeared upon the assessment recited in the contract. The committee in this case, thinking it necessary, with respect to the identity of the premises, that the insertion of the name of Young should be explained, (although there was no other evidence that Young had any interest in the premises) determined the vote to be bad. In the case of Edward Aldridge, 29th April, whose land-tax had been redeemed by Joseph Aldridge, the assessment re-  
cited

cited in the contract was in the name of Deborah Aldridge : positive evidence was given, in support of the vote, that D. A. never had any interest in the premises ; and the title of the voter being proved by a conveyance from one Knight, the committee allowed the vote. And in the case of John Atkinson, 28th May, where the contract of redemption was for premises " belonging to John Atkinson, assessed in the name of Richard Atkinson," and it was contended that a title from R. A. to the voter should be proved, it was argued, that since the *st.* 42 G. 3. c. 116. *l.* 200, there was no necessity of shewing any connexion between the voter on the poll, and the proprietor named in the assessment, that statute having entirely dispensed with the proof of assessment. The committee held the vote to be good<sup>9</sup>.

Of exemptions from assessment; in the case of offices.

See ante, p. 81. *St.* 10 Ann. c. 23. 12 Ann. c. 5. 18 G. 2. c. 18. and *st.* 20 G. 3. c. 17; the last exempts not only annuities or fee-farm rents (duly registered) issuing from lands assessed; but also freeholds which have devolved upon the voter " by descent, marriage, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to an office, within 12 calendar months next before such election;" where the predecessor has been rated within 2 years. And see *st.* 30 G. 3. c. 35<sup>r</sup>. *post*, p. 89.

The following determinations took place relative to the subject of the assessment of offices.

<sup>9</sup> By *stat.* 42 G. 3. c. 116. *l.* 165. every copy of the register of any contract made in pursuance of this act, and registered according to the directions thereof with the proper officer appointed for that purpose, which shall be signed by him, shall be allowed in all courts and places, and before all persons, to be good and sufficient evidence of such contract.

<sup>r</sup> See also *stat.* 38 G. 3. c. 5. (the land-tax act), *l.* 25. by which it is enacted that the statute shall not extend to

charge " any master, fellow, scholar, or exhibitioner of any college halls or hospitals mentioned therein; or any masters or ushers of any schools in England, Wales, or Berwick-upon-Tweed, for or in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising or growing due to them, in respect of the said several places or employments in the said universities, colleges, or schools." No question respecting exemptions by virtue of this clause, occurred before the committee.

27th February. Nathaniel Berry. Nature of freehold, "Organist." It was asserted, in support of this vote, that the office for which he voted, did not require assessment. This was denied on the other side, and it was farther insisted, that at least, in order to prove the office not assessable, the nature of it, and of the voter's appointment to it should be shewn. The committee, adopting this opinion, resolved, "That whenever any vote is objected to upon the ground of non-assessment to the land-tax, and the exemption from such assessment is claimed on the score of an office, the party maintaining the vote shall be called on to prove the nature of the office, and the appointment of the voter to such office." In attempting to produce such proof in the present case, it appeared that the appointment of the voter was only by the year; and the committee upon that ground decided the vote to be bad. This vote had been objected to for want of assessment only.

Committee take notice of the estate not being a freehold, though not made a ground of objection.

Agreed, that the office of parish clerk need not be assessed.

9th March. William Ashfield. Nature of freehold, "Licensed parish clerk." Upon this occasion, the following rule being framed by the agreement of the counsel on both sides, and adopted by the committee, was entered upon their minutes; "It is agreed, that the office of parish-clerk is *prima facie* an office for life, and confers a right to vote, unless some deficiency of value, or other circumstance, be proved to invalidate it; and that it does not require assessment."

Office vacant at the time of making the rate.

3d March. Robert Sturday. Nature of freehold, "one of the sworn clerks of the court of Chancery." The seat having been vacant when the rate of 1801 was made, had not been assessed. The voter had been sworn in, in Easter term 1801. The committee disallowed the vote.

\* The reader will hereafter find that such freeholders were held by the committee not to have a right to vote, unless they could shew that they were entitled by their office to some profit arising from land within the county of Middlesex.

† It will be observed, that the committee never decided that any office, from its nature, was exempt from the

necessity of being assessed to the land-tax: they took occasion to declare this, in the case of W. Ramsden, (see p. 72.) when their decision on Berry's vote (*supra*) was mentioned by the counsel in argument. In the agreement respecting parish clerks, each party, probably, had a view to his own advantage.

25th April. William Chaplin. In this case, the committee determined, "that the office of sexton, when not assessed to the land-tax, does not give a title to vote."

Exemptions from assessment; in cases of descent, marriage, marriage-settlement, devise, or promotion.

It is provided by st. 20 G. 3. c. 17. s. 2. that the first clause (see p. 64.) shall not extend "to any person who became entitled to such messuages, lands, or tenements, for which he shall vote, or claim to vote as aforesaid, by descent, marriage, marriage settlement, devise", or promotion to any benefice in the church, or by promotion to an office, within twelve calendar months next before such election; but such person shall be entitled to vote at such election, if the messuages, lands, or tenements, for which he shall vote, or claim to vote, as aforesaid, have been, within two years next before such election, rated or assessed to the land-tax, in the name of the person or persons by or through whom such person voting, or claiming to vote, as aforesaid, shall derive his title to the messuages, lands, or tenements, for which he shall vote, or claim to vote, as aforesaid, or in the name of some predecessor, within two years next before such election, of such person claiming to vote in respect of any promotion to any benefice in a church, or promotion to an office, or in the name of the tenant or tenants of such person or persons, such tenant or tenants actually occupying such messuages, lands, or tenements." By st. 30 G. 3. c. 35. s. 1. it is enacted, that the above act shall not be construed so as to prevent any person from voting in respect of any messuages, &c. assessed for six calendar months next before such election, towards the land-tax "in the name of the person claiming to vote, or for or in respect of any messuages, lands, or tenements, to which the person so claiming to vote shall have become entitled by descent, marriage, marriage settlement, devise, promotion to any benefice in the church, or promotion to any office, within twelve

\* The Bedfordshire committee held, minor, the year began to run when he came of age. 2 Lud. 528.

calendar months next before such election, and which messuages, lands, or tenements, shall have been within two years next before such election charged or assessed to the land-tax, in the name of the person or persons by or through whom such person so claiming to vote shall derive his title to such messuages, lands, or tenements, or of some predecessor of such person so claiming to vote, although the name of the tenant or tenants actually occupying such messuages, lands, or tenements, shall not be inserted in such assessment, according to the form of assessment to the said recited act annexed." S. 2. extends to tenements rated in the name of the tenant, where the name of the voter, or his predecessor, &c. is omitted.

No question occurred during the scrutiny upon these clauses as they respect the succession of persons to their freeholds by descent, devise, marriage settlement, or promotion: the following case occurred, where the voter had acquired his freehold within the year, by marriage.

Premises must be assessed in the name of some predecessor, who was in possession within two years of the election.

17th March. John Baldwyn voted for premises in his own occupation. In the assessment the Duke of Portland was named as proprietor, and James Poulter as occupier. The premises appeared to have been conveyed from the Duke to one Vincent, in January 1799, by Vincent to George Poulter in March 1800, and to have been devised by George Poulter to his wife Elizabeth, by a will proved 23d January 1801. Elizabeth married the voter in September 1801. It was sufficiently proved that the name of James in the assessment, was put there by mistake for George. It was contended, that the premises having been rated within two years of the election, in the name of "some predecessor," (the D. of P.) through whom the voter derived his title, his right was protected by the statutes 20 G. 3. c. 17. f. 2. and 30 G. 3. c. 35. f. 1. and that neither of these statutes required, that the predecessor, in whose name the premises were assessed, should be also shewn to have been the owner of them within two years of the election. To this it was answered, that by the plain meaning of the statute, it was necessary that the word "predecessor" should be held to signify

✓ The word "predecessor" in 20 office: but in 30 G. 3. c. 35. it may G. 3. c. 17. is only applied to cases be applied generally, to all the cases of promotion in the church, or to an empty cases.

some



some proprietor within two years before the election; and not any person, who, at any distance of time, might appear to have been the owner of them. The committee determined the vote to be bad. See 2 Lud. 329. 530.

V. Questions relating to the estate of the voter: arising,  
1. from the nature of it.

The reader will observe, that in all cases, the party making the objection was called upon, in the first instance, to substantiate it.

13th June. Robert Seamon voted for land-tax which he had purchased. By st. 38 G. 3. c. 60. s. 99, land-tax, purchased, is directed to be considered as personal estate, except in certain cases. (See s. 32, 40.) This vote, (as well as many others, who had voted for property of the same description) was disallowed.<sup>2</sup>

Land-tax  
purchased.

22d March. William Warrell. Freehold; "Organist of the New church in the Strand." It appeared from the minutes of the vestry, that the voter had been appointed for life, and that an annuity had been granted him for his own life and for the life of another, secured by deed upon lands in Surrey. The counsel for the petitioner contended, that it was the office, exercised in Middlesex, which gave the right to vote; but the committee determined the vote to be bad.

Offices.  
Organist in  
Middlesex  
with an an-  
nuity secur-  
ed on lands  
in Surrey.

28th March. John Merrick voted for his office of sexton. It was proved in support of the voter's title, that he had acted as sexton of Uxbridge; and an entry was shewn from the proceedings of the vestry, of his election as sexton, 29th August 1799; but it did not appear that he had been elected for life: and no proof being given that the office was for life, the committee determined the vote to be bad. A similar determination took place afterwards, on the same day, upon the vote of George Gladman, the sexton of Ruilip.

A general  
appointment  
of sexton,  
not held to  
be for life.

<sup>2</sup> It does not appear that this provision is re-enacted by stat. 42 G. 3. c. 116. which repeals the provisions of the former acts, except with respect to purchases before 24 Aug. 1802. By s. 154 of that statute, it is enacted,

that the purchaser of such land-tax after registry of the contract and certificate, (see. s. 38. 164) shall be "taken to be in the actual seisin and possession of a yearly rent or sum as a fee-farm rent," &c.

Parish clerk  
appointed  
generally,  
confirmed  
by the bishop  
durin, plea-  
sure.

24th April. Job Kentish. Nature of freehold, "Licensed clerk of Hendon." This case was first brought on 17th April, and stood over for further evidence. To prove that the voter had not an estate for life there were produced, first, an appointment of him as clerk by the parson of the parish, generally, without any term named for the continuance of his office; secondly, a license from the Bishop of the diocese, in which the appointment was confirmed and approved, "during our pleasure, and no longer." It was argued from hence that the voter held his office at the pleasure of the Bishop; or at least, that there was sufficient evidence of this office not being for life, to put the party who supported the vote on the proof of the contrary. It was answered, that the license of the Bishop was not necessary to the validity of the appointment. *Peake v. Bourne*, Str. 942. That a general appointment is an appointment for life. A mandamus has been granted to restore a parish-clerk. "At common law a parish-clerk is in for life, without deed;" 2 Salk. 536. and see 11 Mod. 261. *Reg. v. Dr. Wall*. The committee decided that the vote was good.

Clerk of  
the Peace.

30th April. Henry Collingwood Selby voted for the office of clerk of the peace for Middlesex. He was assessed "for his office of clerk of the peace for the county of Middlesex 1200*l.* *per ann.* 55*l.*" The circumstances of his case were shortly these: the clerk of the peace is appointed for life by the Custos Rotulorum. The emolument of his office consists of fees taken in the court at the sessions house upon indictments, recognizances, and other proceedings had at that court. He is provided with certain apartments, viz. an office, and a record-room, and a chamber for the residence of himself or his deputy in the sessions house. The sessions house was built for the use of the county of Middlesex, in pursuance of an act of parliament passed 18 G. 3. by which certain commissioners were empowered to purchase land for that purpose: and by which, the use and occupation of the sessions house is directed to be from time to time regulated by the justices of the peace for the county. After

7 See *R. v. E. Warren*, Cowp. 371. 209. And see 1 P. Wms. 29. 2 Gibb. and Just. Burn's Eccl. Law, tit. Parish Cod. p. 198. Canon, 137. Clerk. *R. v. Gaskin*, 8 Term Rep.

an argument, the substance of which the reader will find collected on another occasion, (*infra*, vote of John Ord) the committee determined, "that H. C. Selby, not having a freehold interest in house or land in right of his office, is a bad vote."

Upon the principle of this determination the committee proceeded to strike off the votes of many persons, who had voted in right of offices exercised in the courts of Westminster Hall, or whose emolument consisted of fees from the suitors of those courts; such as the King's Coroner and Attorney, the Clerk of the King's Bench Treasury, the Prothonotary of the Common Pleas, the Filacer of the county of Middlesex, &c. and the officers of the court of Chancery. They also rejected the votes of several persons, who exercised certain offices in Westminster Abbey. The reader is referred to the vote of Mr. Ord for the principal arguments made use of on each side of the question. A few of the distinctions attempted to be taken in particular cases are subjoined.

12th June. John Ord. Residence, on the poll, "John Ord, Lincoln's Inn Fields." Situation of freehold, "in Chancery." Nature of it, "Master in Chancery." Occupier, "Self." Objections, "No freehold: no freehold in the occupation of the tenant named on the poll." The office of Master in Chancery is an office for life, the emoluments of which arise from certain salaries and established fees paid by the suitors of the court of Chancery<sup>2</sup>. The business of the office is carried on in a large building, situated in Southampton Buildings, Chancery Lane. There is one large office for the public business common to all the 10 masters; besides this, each master has, separately, one room which he makes use of for himself; another for the use of his senior clerk; and a third, for his under clerks. There are also two other rooms; one, a repository of proceedings; another, a lobby. These rooms are solely used for purposes of business, and are inhabited, or slept in, by no one<sup>2</sup>.

Office, of which no profit arises from land within the county.

<sup>2</sup> See Com. Journ. 21 Feb. 1798; and the report of the committee of finance, 26 June 1798, Appendix, K. 1. The printed copy of this report was received in evidence by the committee, it being

first proved, that the original had been sought for, and could not be found.

<sup>2</sup> See *Holford v. Copeland*, 3 Bos. & Pull. 129.

The whole estate, buildings, &c. are vested in fee in the King<sup>b</sup>, and the furniture of the rooms, offices, &c. is his property. The buildings are assessed to the land-tax, but not to the poor's rate.

It was objected on the part of the sitting member, that this was not such a freehold as would confer a right to vote. The counsel for the petitioner supported the vote by the following arguments.

Argument  
in support of  
the vote.  
Statutes 3 &  
10 H. 6.

The law requires, that every elector for a county shall have a freehold estate of the annual value of 40s. By st. 8 H. 6. c. 7. he must have "free land or tenement," to that amount. By st. 10 H. 6. c. 2. he must have "freehold" within the same county. If the office in question be a tenement, or freehold, of the annual value of 40s. in the county of Middlesex, it is such as, within the general purview of the law, and of the above-mentioned statutes, will confer a vote. It is clear that a man may have a freehold in his office; and that an office is comprised within the word tenement. This is an ancient office of profit; and an assise, or a writ of *novel disseisin*, lies for it; which is an action strictly confined to real property, and for the recovery of freehold rights. See Bacon's Abridgment, Tit. Offices and Officers, G. "It is held clearly that an assise lay at common law for an office;" i. e. an office of profit; and it is there said, that this remedy subsists in the case of offices that are held in tail, or for life, as well as in fee. In Fitzherbert's *Natura Brevium*, 192 E. is a form of a writ of *novel disseisin* for the office of Serjeant in the abbey of Peterborough, which the demandant claims to be his right and inheritance; and in p. 178. F. of the same book it is said, "a man shall have an assise of *novel disseisin* of an office, if he have the same for life, and the writ shall be, that he *disseised* him of his freehold in D.; and he shall make his plaint of the office, and shew his title in the plaint." See also the note (a) at the end of the same chapter.

The law is laid down still more expressly in Jehu Webb's case, 8 Co. Rep. 47. a. "It appears from the books that

<sup>b</sup> By stat. 32 G. 3. c. 42.

11. pl. 22. 30. pl. 4.

<sup>c</sup> See Lib. Ass. 8. pl. 7. 10. pl. 11.

an assise lay of an office *ut de libero tenemento*, at the common law;" and several instances are given, of offices which have become the subject of that sort of action; as the bailiwick of keeping a park, the bedelry of an hundred, or soke; and "exception was taken, that it was a profit issuing out of no freehold; but this was not allowed." So the office of Serjeant in a cathedral church; of packing of cloths; of Sheriff; of Clerk of the Crown in Chancery; Filazer in the Common Pleas, &c. &c. In Lord Raymond's Reports, vol. 1. p. 158. is the case of an assise brought in Kent, *de libero tenemento*, and the plaint was for the office of clerk of the peace. It appears therefore, that these offices are tenements; that they are freeholds of the nature of real property; subject to the same forms of conveyance, and to the same legal remedies, and proceedings, as other real property, of whatsoever kind. And it is to be remembered, that such offices only come under this description, as are offices of profit, not merely of charge; and as are also of a public nature, and either erected of old, or, if in modern times, of necessity, and for the good of the public. Other duties or appointments of a private nature, although a man may have them for life, &c. are merely personal, and are not even entitled to the name of offices, in the proper and legal signification of that term; but are called employments. See Bacon's Abridgment, Tit. Offices and Officers, A. B. C. D. There is no doubt that the office in question is ancient, public, and necessary; that it is such as a man may have a freehold in; and that in the present instance, the voter has a life estate in it, and that he exercises the duties of it within the county of Middlesex. He therefore has a right to vote in that county as a freeholder. The statutes, which concern elections in counties, contain nothing adverse to his claim: but on the contrary lean in favour of it. It has already been observed, that the statutes 8 & 10 H. 6. comprise it, within the meaning of the words "freehold and tenement." The st. 12 Ann. c. 5. exempts from the necessity of assessment persons voting for rents, tithes, or other incorporeal hereditaments, which have not usually been assessed, &c. It is clear, that this office is an incorporeal

real

real hereditament. The st. 18 G. 2. c. 18. s. 4. contains a similar exemption in favour of persons voting for seats belonging to offices; and in s. 5, it provides for the rights of persons who have become entitled to vote within 12 months by promotion to an office. These passages contain an acknowledgment by the legislature that offices confer a right to vote. If it had been thought to be the land, which was held by virtue of the office, and not the office, that gave the right, it would have been so expressed, but such a doctrine is negatived by the very words of the st. 12 Ann. before cited, which uses the words incorporeal hereditaments; whereas, the land, &c. appertaining to the office, would be a corporeal hereditament, were that considered to be the foundation of the right. Besides, it frequently happens that the freehold of the land, &c. annexed to the office, may be in some other person, and the interest of the officer therein may be only an easement, or incorporeal right of enjoyment, incidental to his office, in which his freehold is properly said to exist<sup>d</sup>.

Argument  
against the  
vote.

The counsel for the sitting member insisted that the office of master in Chancery did not confer a right to vote.

An office is the duty which a man is bound to perform for certain fees and emoluments. It is the consideration which he pays for the advantages derived to him from the profits of it. It is, in this respect, like the rent which is paid for land; or rather, it still more nearly resembles the services, which in ancient times used to be rendered, as the terms on which lands, castles, &c. were held. As it is clear, that the land confers the right to vote, and not the rent or

<sup>d</sup> See *Sone v. Ashton*, 3 Burr. 1287. The question was, Whether the office of marshal of the King's Bench was a sufficient qualification for a commissioner of the land-tax in Surrey? By the st. 33 G. 2. c. . the qualification must arise out of lands and *tenements*. The freehold of the prison, marshal's house, &c. is in the crown. It was insisted, that the office was not such a tenement as the act required.

Lord Mansfield, "Is not his office a tenement? and he has a qualified freehold in it. He is qualified, both within the words, and the intention of the statute. Is not the Master of the Rolls qualified for the houses which belong to him in the right of his office? I know that the Master of St. Catherine's has sat in parliament under the qualification of his office."

service which is paid for the land, it should follow that the office which is the burden to be discharged cannot be the foundation of such a right; and as for the emoluments which arise from the discharge of that burden, it is evident that they are in this case merely personal, and not in the least connected with land, or any subject of a real nature. Strong objections arise against the claim of this voter, when it is considered in a parliamentary view. Knights of the shire are understood to represent the landed interest of the county, for which they are returned. The electors are the members of the county court; but there is no trace of such officers as these having ever been summoned to, or having appeared at that court, or of their being considered as members of it. See 1 Heyw. 44. Neither is there any trace of their being called upon to contribute to the wages of the knights, which has been thought by some to be a criterion, by which those who formerly had a right to vote might be distinguished. It is said, that this office is comprised within the meaning of the word "tenements." But that word will be found to include only such inheritances as concern the land. Lord Coke, in his commentary upon the stat. Westm. 2. 13 Edw. 1. (commonly called *de donis*) fully explains this distinction. The word tenements, he says, includes not only all corporate inheritances, which are, or may be holden, but also, "all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure: as rents, estovers, commons, or other profits whatsoever granted out of land: or uses, offices, dignities, which concern lands or certain places, may be entailed within the said statute, because all these favour of the realty. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certain place, such inheritances cannot be entailed, because they favour nothing of the realty." The office of Master in Chancery cannot be said to favour of the realty; it does not concern land; but is in its nature merely personal; it does not relate to any particular place; nor is it exercisable in any particular

Co. Litt.  
20. a.

spot, but may be removed at the king's pleasure. It is admitted that the voter has a freehold interest, having an estate for life in it; and for this reason it is, that it may be the subject of a writ of assise, &c. but it does not follow from thence that it is of the nature of a real estate, or connected at all with land, or can be considered as the foundation of the elective right. If it were so, and if every thing which is the subject of an assise would also give a right to vote, there are many other things that may be named, which never yet were supposed to give that right; as, a corody, &c. It cannot be supposed that the tenant of a corody, or a packer of wool, or a serjeant at arms, or the keeper of a church, would be considered as members of the county court; yet all these are said by Lord Coke to be officers, who may have an assise for their offices. It is said that the statutes 12 Ann. and 18 G. 2. expressly name offices; but on the contrary they only speak of those who claim a right to vote in respect of any messuages or seats belonging to offices, and not of the offices themselves: if these statutes afford a ground of argument on either side, they seem rather to shew, that offices, as such, do not give a right; but that there being certain offices to which houses or seats are attached, he who by virtue of his office has a freehold interest in a house, &c. may vote for the house, though he may not vote for his office. It is plain that in the present case the voter can claim no right in respect of the place where he exercises the duties of his office, since the freehold of it is vested in the crown. Lastly, it is to be considered, what inconvenience would follow, should offices, such as these, whose profits are merely personal, and not at all connected with land, be considered to give a right to vote; since every employment, even that of menial servants, might be given for life, and might, upon the same grounds, be construed to be a freehold, and an office.

The vote was determined to be bad.

*Office of  
six-clerk.*

13th June. Charles Edmonstone, one of the six-clerks of the court of Chancery. It appears from the report of the Committee of Finance made to the House of Commons in 1797, that these officers are appointed for life, by the Mas-

ter



ter of the Rolls; that their emoluments consist of certain salaries paid at the public offices, and fees from the suitors; and that the office is exercised by them in person in Chancery-lane. The former building used for this purpose having become ruinous, a new one was erected under the provisions of stat. 25 G. 3. c. 56., by which the land directed to be the site of the new building was vested in the said six clerks, to hold to them, and their successors for ever. It was attempted to distinguish this case from the preceding, by observing that here the land was specifically conveyed to the clerks, and that they had an interest in the land, for which they might vote; but it was answered, that this interest was vested in them as a corporation aggregate, and that individual members of a corporation could not vote in respect of their particular share of an estate vested in the corporation collectively: for this was cited the case of *Dr. Stone*, one of the 12 vicars of Hereford, Gloucestershire case, p. 136. where it was resolved, That he, being part of a corporate body, composed of a custos and 11 vicars of Hereford, had not a right to vote for his part of the estate vested in the corporation. The vote was determined to be bad <sup>c</sup>.

Land conveyed to them as a corporation aggregate.

13th June. Ch. Arnold, one of the sworn or sixty clerks in the court of Chancery. The sixty clerks practise as attornies or solicitors in the court of Chancery, in filing bills, engrossing proceedings, &c. Their emoluments arise from fees paid to them, in the causes in which they are employed. The office of each six-clerk is divided into seats, of which one is allotted to each sworn clerk. The sworn clerks are appointed by the Master of the Rolls, on the recommendation of the six-clerk in whose office the vacancy is, which is to be supplied. In defence of the vote it was observed, that a seat was attached to this office, which brought it within the statutes 12 Ann. c. 5. and 18 G. 2. c. 18.; but it appearing that no profit whatever was derived by the voter from the seat, all the emoluments of the office arising from the fees paid him by his employers, the committee decided the vote to be bad.

Office of sixty clerk.

\* See 1 Heyw. 71. 1 Journ. 714. 798. Dalton's Sheriff, p. 333. 2 Lud. 368.

**Sub-register.** 13th June. John Coppinger, sub-register of the court of Chancery. This office has no land, nor any salary arising from land attached to it, nor any house, except for the business of the office. The emoluments entirely arise from the fees paid by the suitors of the court. The counsel for the petitioner, understanding the committee to have determined, that a feat connected with an office (the profits consisting of fees only) does not sufficiently give to the office the nature of real property, gave up this vote, and it was declared bad.

**Clerk of the Petty-bag.** 13th June. Thomas Mendham, clerk of the Petty-bag-office. The only circumstance, which distinguished this case from the foregoing, was that this voter had let a building adjacent to his office and which was formerly used as a part of his office, for the rent of 24 guineas *per annum*. It was argued, that in this case, a profit was derived from the land, or messuage itself, which was annexed to the office. It was answered, that the letting of a part of the building allotted for the office was a perversion of its purpose, and would make no difference in the present question; that in the former cases had the building set apart for the business of the offices to which they appertained, been let out to private tenants, it would not have altered the law with respect to the vote, since the use of the building was properly for the accommodation of the public, and not for the private emolument or advantage of the officer. The committee decided the vote to be bad<sup>d</sup>.

Letting out part of the building destined for the business of the office.

### Among

"No case is mentioned by any author upon the subject of elections, of a vote being questioned, on account of its being given for an office; nor has the reporter been able to find an instance among the Journals of a decision upon that subject, so far as he has had an opportunity of searching them for this purpose. The passage that occurs in the case of Cambridgeshire, 12 Feb. 1693, 11 Journ. 93. is hardly of sufficient consequence to be mentioned: a witness said, that Davis (a voter objected to) "had only a barber's place to a college, with a salary of 6*l.* a-year;

and a singing man's place at Ely; and had no freehold." And in the case of Yorkshire, 22 April 1736, 2*a* Journ. 696. it was contended by the counsel for the petitioner, that several persons have been disqualified by the evidence given or their being schoolmasters, parish clerks, curates, and hospital-men. See 2 Lud. 587. But it does not distinctly appear upon what ground their disqualification was contended for.

It might be expected that several authorities would be found, with respect to a subject not wholly dissimilar from the present, namely, the qualification of jurors

Among the other officers whose votes were struck off by the committee, were the following :

King's coroner and attorney. K. B.

Clerk in court. K. B.

King's

jurors under st. 2 H. 5. c. 3. which requires them to have *lands or tenements* of the yearly value of 40s. The reader will find a number of cases referred to, in Co. Lit. 156. b. 157. a. 272. b. Hawk. P. C. book 2. chap. 43. Dalton, in his Office of Sheriff, p. 333. treating of the construction put upon the words *lands or tenements* in st. 3 H. 6. cap. 7. (respecting electors) cites several of the positions laid down in Co. Lit. 272. b. with respect to jurors.

He lays down the following rules respecting the construction of the stat. 3 H. 6. "He that hath no other freehold (or inheritance) but advowsons of churches, though they be of the value of 40s. (or 40l.) by the year, yet thereby he hath no such sufficiency, nor such freehold land or tenement, as that thereby he may be a chooser of the knights of the parliament, &c.

"He which hath no other freehold than common of pasture, though that be to the value of 40s. *per ann.*, yet he may be no chooser: but he which hath a freehold house or lands, of the yearly value of 30s., and besides hath thereto belonging a common of pasture appendant, to the yearly value of 20s. he may be a chooser, &c.

"Otherwise it is, if his house be a new-created tenement, or erected within the time of memory; for that common appendant must be by prescription; and therefore, except such house be of the yearly value of 40s. besides the common, it enableth him not.

"If a man hath a free warren of coney, the which *communibus annis* is worth 40s. *per annum*, this is sufficient freehold, &c.

"If a man maketh 40s. by the year (*communibus annis*) of his wood-sales, coal-mines, tithes inappropriate, or the like, being his freehold, these are sufficient, &c.

"If a man hath 40s. rent *per annum*, or an annuity of 40s. *per annum* issuing out of lands, during his life, this is sufficient.

"Note, that by the common law, all freemen of England, had a voice in the election of these knights, within the counties where they dwelt; but now by these statutes of 3 H. 6. & 10 H. 6. they are restrained to such as have 40s. freehold *per annum*, within the county, &c.

"Again, it seemeth they must be such freeholders, as do contribute to the wages of the knights of the shire; or else such as are suitors to the county court."

It is to be lamented that the characters by which we are directed to distinguish who are electors of knights of parliament, are themselves so obliterated by time and disuse, as to be no longer discernible. No account either of the members of a county court, or of those upon whom the knights wages were levied, has been preserved, of sufficient minuteness or accuracy to enable us to judge whether any, or what, difference existed, as to the nature, or quality of the freehold.

By 28 G. 3. c. 36. s. 6. it is required of every person before he votes in a county election, to make a declaration (among other things) that the estate for which he claims to vote "consists of (specifying whether the same consists of lands, or of messuages, or of tithes, or of an office, or of a rent-charge"

## ELECTION CASES.

King's bench office.  
 Clerk of the treasury. K. B.  
 Secondary in K. B.  
 Curfitor.  
 Filacer.  
 Attorney of the pipe.  
 Usher of the common pleas, and exchequer,  
 Sealer in the court of chancery.  
 Deputy chirographer.  
 Prothonotary.  
 Clerk of King's silver.  
 King's remembrancer.  
 Clerk of the juries.  
 High bailiff of Westminster.  
 Official of the arch-deaconry.  
 Steward of the dean and chapter.  
 Register of fines.  
 Lay vicar.  
 Abbey brewer, and butler.  
 Bell-ringer to the abbey.  
 Gardener to the abbey.  
 Receiver to the abbey.  
 Cook to the abbey.  
 Organ blower to the abbey.  
 Chorister.  
 Alms-man.  
 Abbey sacrist.

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charge"—and "if the said estate consist of an office, then naming the same.") And see Schedule, No. 1. specifying the form of the register of freeholders: "Freehold estate: (that is) whether it be lands, or messuage, or tithes, or

office of (naming such office,") The immediate object of this statute was to provide a register of all the freeholders in counties: but it was never put in force; and was repealed by ft. 29 G. 3. c. 18.

Questions relating to the estate of the voter: arising, 2. from the value of it<sup>e</sup>.

16th March. John Beaumont. In this case, the committee determined, "That a mortgage on a freehold shall be considered to invalidate the vote, if the interest paid by the voter reduces the value of such freehold below 40s. *per annum*." It appeared however, that although the mortgage in this case greatly exceeded the value of the particular estate in right of which the vote was given, there were other estates conveyed also in mortgage by the same deed, the rents and profits of which were much beyond the interest of the sum borrowed. Under these circumstances the committee determined the vote to be good. The case was argued at great length, but nothing material having been added to the arguments reported by Mr. Luders in the case of Richard Stringer, 2 vol. p. 450, it is unnecessary to repeat them here<sup>f</sup>.

Value reduced by mortgage below 40s. avoids the vote.

2d May. Samuel Chafe. He had mortgaged the premises for which he voted, in the year 1782, for the sum of 350l. They were stated to be worth 40l. *per annum*. In 1798 the interest being in arrear, he gave up the possession to the mortgagee, permitting him to receive the whole of the rents and profits, to be applied by him, not only to the

Mortgages suffered to be in possession of an estate of much greater value than the income.

\* It was determined by the Bedfordshire committee, 2 Lud. 444. that if a voter gives in a freehold on the poll which is not worth 40s. a year, the vote is to be considered as a bad one, notwithstanding he may be possessed of other freeholds amounting to more than 40s. S. v. p. 446. But they held that it was not necessary that the whole of it should be assessed, p. 525. The freehold consisted of land and houses: and the land only was assessed, which brought the value of the freehold assessed, below 40s. See *ante* p. 51.

<sup>f</sup> The Bedfordshire committee resolved "that the interest upon a mortgage, the mortgagor still being in possession, is such a charge upon the estate within the meaning of the statutes, as to affect the rights of the voter." 2 Lud.

p. 467. The Cricklade committee determined, "That the mortgagor in possession of lands of the value of 40s. a year; and the devisee in possession of lands of the value of 40s. a year, devised subject to the payment of debts and legacies, are entitled to vote." 1b. p. 471. The Buckinghamshire, "That a mortgage is such a charge on land, as may reduce the value of the freehold below what may entitle a person to give his vote for a knight of the shire." 1b. See 1 Heyw. 91. Simeon, p. 85—88. By s. 28 G. 3. c. 36. (mentioned *supra*. p. 102.) s. 6. the voter was required to declare that his freehold was of the yearly value of 40s "over and above the interest of any money secured by mortgage upon the said estate," &c.

brance :  
mortgagor  
permitted to  
vote.

reduction of the arrears, and the discharge of the growing interest, but also to the payment of the principal money. In 1803 the arrears had been paid off, and the principal debt had been reduced to 260*l*. The voter, up to the time of the trial, continued out of possession, and the rents and profits were still received by the mortgagee. The committee decided the vote to be good.

Value under  
40*s*.

18th April. Matthew Rolph. Objection, "value under 40*s*." The land for which he voted was an orchard, in quantity about one rood. Three witnesses were called who valued it at about 20*s*. *per annum* in the state in which it was at the time of the election: but they said there had been a cottage there formerly, then in ruins, and that a new one had been built since the election. It was said, that the actual value in the particular year of the election was not so much the question, as the reasonable value of the land, &c. in its usual state: it might happen, that very valuable property might produce nothing in the year previous to an election<sup>a</sup>. It was answered, that the true criterion of the value, was the rent which might fairly be expected for the property, and not what might possibly be made by the tenant in the course of one year. The vote was determined to be bad<sup>b</sup>.

Measure of  
value.

<sup>a</sup> See ante, p. 27.

<sup>b</sup> The Bedfordshire committee decided, 2 Lud. 450. "That the value of a freehold, in right of which the owner votes, is the rent which a tenant would give for it; and not what the owner, occupying it himself, may possibly derive from it." They considered the vote of J. Southwell good, who was entitled to a sixth part of a messuage let at 8 guineas a year to a tenant, who was bound to pay the land-tax of 2*l*. 4*s*. 6*d*. and to expend 3*l*. annually in repairs. Including these two sums, the voter's share amounted to 2*l*. 2*s*. 2 Lud. 447. They afterwards passed a resolution, "that the land-tax, when paid by the tenant, constitutes a part of the rent paid by him for the land, and

is to be considered as part of the income in right of which the owner votes." A similar motion respecting the house and window tax, was negatived. P. 476. See ft. 18 G. 2. c. 13. s. 6.

Dalton's Sheriff, p. 333. "If A. hath lands to the value of 40*l*. *per ann*. and letteth the same out to another for life, reserving no rent, or but 20*s*. or 30*s*. rent *per annum*, this seemeth not to be sufficient freehold for A. during the term, &c. to give his vote.

"Yet if he letteth such his lands to another but for years (though for divers years) reserving only 20*s*. or 30*s*. rent *per annum*, (or *absque aliquo reddendo*) during the said years, yet here he may be a chooser, &c. in regard of the freehold in him."

17th April. A. D. O'Kelly. It was objected to him, that his freehold was under the value of 40s. and the books of assessment were tendered in evidence, from which it appeared that his freehold was rated at a less value. But the committee determined, that "no proof whatever of the actual value of the freehold could arise from entries on the books of assessment." The same determination took place in several other cases <sup>1</sup>.

Sum named  
in the assess-  
ment no evi-  
dence of  
value.

Questions relating to the estate of the voter : arising, 3. from the local situation of it.

30th June. Thomas Foster voted for two shares of Fulham Bridge<sup>k</sup>. The tolls of the bridge are collected in Middlesex. By st. 12 G. 1. c. 36. s. 32. it is enacted, that all actions brought against any persons for any thing done in pursuance of that act (for building the bridge, &c.) or in relation to the premises, shall be laid in Surrey, and not elsewhere. It was attempted to be argued from this clause, that the estate must be considered to be in Surrey, and not in Middlesex, since it could only be recovered, or protected, by actions brought in the former county. It was answered, that the statute was not intended to be applied to actions brought respecting the title to the bridge, as ejectments, &c. but to personal actions brought for things done in pursuance of the act : secondly, that if it extended to all kinds of actions, still, that the statute had not altered the local situation of the freehold in other respects, and for other purposes. The committee allowed the vote.

Freehold in  
Middlesex,  
altho' such  
actions re-  
specting it  
directed to  
be brought  
in Surrey.

Questions relating to the estate of the voter : arising, 4. from the voter's title to it.

17th March. James Cole. To prove the voter's title to the freehold, (upon the objection of non-assessment) a wit-

Contract of  
sale, and  
possession

<sup>1</sup> The same was decided by the Bedfordshire committee, 2 Lud. 448. It is remarkable, however, that in the preamble to st. 12 Ann. c. 5. it is said that "it was only intended thereby," (i. e. by st. 10 Ann. c. 23.) "to ascertain the value of lands or tenements, by

making the proportion paid to the public taxes, church-rates, and parish duties, or such of them to which the same were usually charged or assessed, the measure of the value thereof."

<sup>k</sup> See 1 Doug. Rep. in K. B. p. 305. n. 2.

given a year before the election; though the conveyance executed within the year.

nefs was called, who deposed, that he, on the part of the Duke of Portland, the former proprietor, had contracted with the voter for the sale of the premises in the year 1799; that the voter had since that time been in the possession of the rents and profits of them; but that no conveyance had been executed till within a year of the election. The committee determined the vote to be good<sup>1</sup>.

Purchase and possession of the premises long before the election: conveyance afterwards.

28th June. Benjamin Vulliamy. The conveyance to the voter was in 1803; but it was proved that he had paid the purchase money in 1798, had been let into possession at that time, and had enjoyed the rents and profits of the estate voted for, from that time. His vote was determined to be good.

Same point.

2d July, Thomas Powis. To prove the voter's title, a conveyance to him was shewn, dated August 1801. The tenant of the premises being called as a witness, deposed, that he had paid rent to the voter, by the directions of the former owner, long before that time. The vote was declared good.

Estate devised to be sold for payment of debts; surplus to the voter: he may vote before the sale.

28th March. Richard Rice. His freehold was assessed in the name of Ann Cook. The property had been devised by Richard Chandler Cook to his wife for life, remainder to trustees to sell for the purpose of paying debts and legacies, the surplus to be divided amongst Richard, Thomas, and John Rice. The tenant for life died July 14, 1802. The estate had not been sold. It was objected, that the remainder-men took only an interest in a personal estate. It was answered, that they took an equitable interest in the freehold estate immediately upon the death of the tenant for life, and that it was incumbent on those who impeached the vote, to

<sup>1</sup> So, the Bedfordshire committee determined, that where the contract was before the election to sell on 25 Mar. 1784, 13 days before the election, and the conveyance was made after the election, bearing date 25 Mar. the vendor had no vote. 2 Lud. p. 428. The Gloucestershire committee, 1777, struck off the vote of one who had con-

tracted for the estate, and had been let into possession in 1774; where the conveyance was not executed till 1776. p. 163. And they also struck off the vote of one who had sold his estate before the election, taking a bond from the purchaser, for his enjoyment of the rents and profits during his life. p. 183.



shew that the land had been sold, and converted into money. The committee determined the vote to be good<sup>m</sup>.

17th April. Charles Pegler, He voted for land in Great Stanmore, which he held as clerk of the parish. The appointment of the voter to his office by the parson of the parish was proved; and evidence was given, that the land in question was in his possession, and had been enjoyed by his predecessors as belonging to the office. This was held sufficient proof of the title of the voter.

Land attached to an office: what proof of title is sufficient.

31st May. Edward Simpson, Objection, "No freehold." It was proposed to shew that the voter had parted with his estate before he voted. His vote was given 29th July, 1802. On the 22d of June preceding, he had sold the estate by auction to one Linton, who paid a deposit of 39*l.* per cent. at the time of the sale. The voter, at the same time, agreed to clear up all outgoing to the 24th June, 1802, and to make a conveyance on the 12th of July then next, upon the deed being prepared by the vendee, and upon payment of the rest of the purchase money. It appeared however that in point of fact, the deed of conveyance, not having been prepared till the 30th of July, was executed on that day, and the possession of the premises delivered to the vendee at the same time. It was likewise proved, that the voter continued to occupy a house (parcel of the premises sold) at the time of the election; that he had quitted it in the October following; and that he had paid rent for it to Linton from Midsummer to Christmas 1802.

Contract before election: conveyance delayed till after by default of vendee: vendor may vote.

Against the vote, it was said, that the vendee had an equitable title to the estate at the time the vote was given; that he might have claimed a specific performance of the

Argument against the vote.

<sup>m</sup> See 1 Atk. 622. 2, 71. 3, 273. Gloucestersh. p. 129. 1 Heyw. 62—63. Simeon, 84. But see 2 Lud. 540. Gloucester, 163. And see W. Parry's vote, Gloucester, 82. where the voter, who had articed to sell his estate and had put the vendee in possession before the election, was allowed to vote, the conveyance not having been executed, nor the purchase-money paid. But see

2 Lud. 427. Where there was a devise to A. B. to sell, and pay legacies, and the legatee (the voter) took possession of the land in satisfaction of the legacy, the vote was held good. 2 Lud. 424. So where the devisee of an annuity charged on land, took the land by parole agreement in satisfaction of the annuity, the vote was held good. 2 Lud. 440.

agreement on the 12th of July, on which day the conveyance was stipulated to be made; and that he himself had a sufficient title to have given him a right to vote, had it not accrued to him within a year of the election. He was in possession of the rents and profits of the estate from Midsummer 1802. Mr. Serjt. Heywood says, "In truth the question in this and other cases seems to be, who is to have the rents and profits of the estate, by virtue of the agreement, until the legal conveyance is made? for if they belong to the vendee, under such circumstances, as that he can compel a specific performance, the vendor is the trustee of the legal estate for him; but, on the contrary, if they belong to the vendor, though the vendee is in possession of the premises, he clearly is entitled to vote, by the 7 & 8 W. 3. c. 25."

Argument  
for the vote.

On the other side, the principle laid down in the passage cited, was not denied, except in as far as the application to a court of equity for a specific performance was supposed to proceed on the principle of the seller being a trustee for the buyer: whereas, it was said, that such an application proceeded upon a contrary principle, *viz.* that the seller refused to complete his contract, and retained the estate to himself. But here, the question of specific performance did not occur: since the conveyance was made to depend upon two acts to be done by the vendee; namely, the payment of the remainder of the purchase money, and preparing the deed; till he performed both these things, the estate remained in the vendor; and had they never been performed at all, the estate could never have been divested from him. With respect to the receipt of the rent from Midsummer to Christmas 1802, as it was not payable till it became due, he who was in possession of the estate at the time it became due, was entitled to it<sup>a</sup>: also, it might be a matter of contract that the vendee should receive the rent from Midsummer;

<sup>a</sup> Because the rent is not due till the last day. If the lessor die before the day, the rent goes to the heir, not to the executor. See Com. Dig. Rent, B. 9. Yet the lessor would be said to

be in the receipt of the rents and profits to the time of his death. So, if the tenant for life die before the day, the rent goes to the remainder man. Salk. 578. 1 Saund. 287. See 2 Lud. 540.

which

which would not however affect the legal interests of the parties with respect to the estate itself. The committee determined the vote to be good \*.

18th June. John Pringle. The name of the Duke of Portland appearing upon the assessment as proprietor, it became necessary in support of the vote, to shew a title in the voter derived from the Duke. It was proved, that he had made an agreement with the Duke's steward for the purchase of the estate in 1799, and had been let into possession of it at that time; but no deed of conveyance was produced, and it was proved, that the voter had been served with a notice to produce his deeds. It was insisted, that it was necessary the conveyance should be produced, and that the committee had always required the production of the conveyance itself, when it could be procured, as the highest proof of the title. See *ante*, p. 68. It was answered, that supposing no conveyance had been executed in this case, yet the voter had in equity, a freehold interest in the estate by virtue of his possession under the contract, and that a court of equity would at any time compel a conveyance to be executed to him. The committee determined the vote to be bad.

Conveyance held necessary to be produced, in proof of title.

25th June. Henry Smith. The land-tax of the premises for which he voted had been redeemed. In the contract of redemption Messrs. Dent and Keyfall were stated to be proprietors; Messrs. Child and Co. occupiers. It was necessary to prove the title of the voter. For this purpose evidence was given of the voter acting as a partner in the house of Child and Co. The committee did not think this sufficient proof of his having a freehold interest as joint-tenant in the premises, and determined the vote to be bad.

Being partner in trade, not sufficient proof of a freehold interest in premises belonging to the partnership.

16th May. Arthur Anstey voted for chambers in the Old Buildings, Lincoln's Inn, in his own occupation. He was objected to for want of freehold. The nature of his title was as follows: William Earl of Mansfield, in 1786, conveyed certain premises, including those for which the vote was given, to 24 persons (the benchers of Lincoln's Inn at that time) and to their heirs and assigns for ever, in

Freehold tenant under the society of Lincoln's Inn.

\* See W. Parry's case, Gloucester, 82. cited *ante*, p. 107.

trust to and for the only benefit of the society of Lincoln's Inn. The voter, in 1796, obtained a life interest in the premises for which he voted, in the following manner; upon the petition of Robert Capper, February 20, 1796, to the benchers, or council, an order was made, dated 26th February in the same year, for the admission of Mr. Antsey to the premises for life, on the surrender of Mr. Capper, and upon payment by each of them of the dues then owing to the society, and by Mr. A. of the usual fine. The words "Be it so" were written upon the petition, by one of the benchers; and the above-mentioned order was entered on the books of the society, but was neither signed by any of the benchers, nor stamped; a piece of parchment was delivered to the voter, unstamped, signed by the treasurer (who is a bencher) and the steward, containing the substance of the order. This is the form, by which chambers held of the society have been transferred for the last 300 years. The tenant for his own life must be a member of the society, and at the time of his admission as a member he gives a bond for the observance of all its rules; he cannot transfer or surrender his chambers to another for the life of the surrenderee, without the permission of the society, and payment of a fine; but he may dispose of his own interest in them, without such permission or payment; or he may let them for a year, or more; but the occupier ought, by rule, to be a member of the society. There are certain annual dues payable by the tenant for life, of a higher amount than those payable by other members of the society who hold no chambers. The tenant has the entire control over the interior of the chambers; but he may not make any alteration in the outer walls, or roof, without permission from the society, by whom the outward building is kept in repair. At the council at which the above-mentioned order for the admission of Mr. Antsey was made, 12 benchers were present, 9 of whom were feoffees originally named in the conveyance from Lord Mansfield. The rest were then alive, but were not present. The benchers assemble in council for the purpose of transacting business; in general, five must be present to form a council; but for the purposes of a call  
to

to the bar, or the transfer of chambers, the presence of three only is required.

The following objections were made to the title of this voter. First, the estate never passed to him, since all the feoffees in trust did not join in the conveyance. Secondly, there is no legal deed of conveyance of the estate, either signed, sealed, or duly stamped. The admission is more in the nature of a transfer of copyhold, than of freehold estate. The title given by the benchers is such as would not be available against them in a court of law. The courts of law, indeed, have no jurisdiction over the Inns of court<sup>p</sup>. They are societies of a very peculiar, and anomalous nature; law universities, subject to the control of the chancellor and 12 judges, who are the visitors, and have a domestic jurisdiction there. They voluntarily submit themselves to certain constitutions and laws, by which each member of the society is bound; not only by such as are already framed before his admission, but by such also as the governing body may thereafter make; and instances occur in Dugdale's *Origines Juridicales* of restrictions in point of dress, and of expulsion being made the penalty for disobeying them: but an estate, defeasible by conditions hereafter to be imposed according to the will of the grantor, cannot be termed a freehold estate. It is, in fact, held at the grantor's will. Thirdly, neither is it an equitable estate. If the entry and admission should be insisted upon as an agreement for a transfer of the title, it is answered, 1. That the agreement not being stamped, could not be brought into a court of equity.—2. That the nature of the property is equally exempt from the jurisdiction of a court of equity, as of a court of law: as it was held in the case of *Rakestraw and others v. Brewer*, 2 Peere Williams, 512. — *Brown's cases in Chancery, Cunningham v. the Benchers of Gray's Inn*. That cannot be an equitable estate, which cannot be made the foundation of a suit in equity. Neither can the admission be considered as a declaration of trust; for it is not signed by the

Argument  
against the  
vote.

<sup>p</sup> See Douglas's Reports in *K. B. Gray's Inn*. 1 Bl. Com. 23. 25.  
353. *The King v. The Benchers of*

party who is by law entitled to declare such trusts, as is required by st. 29 Car. 2. c. 3. s. 7.

Argument  
in support of  
the vote.

These arguments were answered by the following. It appears that this mode of conveyance has been in use for three centuries. For so long a time, it has been the practice for a small number of the benchers to act for the whole; the committee will not hold all the acts done by them to be null and void, but will rather infer an authority legally delegated from the whole body to the smaller number. It is clear that the society of Lincoln's Inn is not a corporation; so that the objection made against this voter is not such as has heretofore been made against members of colleges<sup>9</sup>, whose interest is a permissive occupation, and who have neither an individual property, nor a right to transfer. This is a voluntary society of persons, who conform themselves to certain rules, and who, whether by charter, or long usage, have excluded from themselves the ordinary jurisdiction of the courts of law, submitting themselves to another jurisdiction, or arbitration, of a private and domestic nature. By formal admission, and for a valuable consideration, they have granted out a life interest to the voter, who is in the enjoyment of the estate, and may dispose of it as he pleases. This grant is good against themselves, and there is no other title, by which the estate of the voter can be affected. It is an equitable title; and the admission is of the nature of a declaration of trust, which need not be stamped. The conveyance is in a form peculiar to themselves, but hitherto found sufficient to secure the estate to the grantee. The regulations which are imposed, or which may be hereafter imposed, are conditions, which the grantee has bound himself to observe. They are charges upon the estate, but do not affect the interest of the owner, any more than any other conditions, which may be imposed on other estates, held, as these are, *sub modo*. It is a freehold, as long as the condition remains unbroken. Neither has it in this case been distinctly proved, that there are any regulations now subsisting, the breach of which, would be followed by the

<sup>9</sup> Gloucestershire case, p. 136.

forfeiture of the estate. The statutes of assessment, 12 Ann. c. 3. and 18 G. 2. c. 18. exempt persons who vote "in respect of any chambers in the inns of court and inns of chancery". From this it appears that a freehold interest in such chambers was considered to confer a right to vote. The committee determined that Arthur Anstey was a good vote.

16th June. Rev. W. Bell. Objections, "no freehold, and not duly assessed to the land-tax." The voter was a prebendary of the cathedral church of Westminster, and voted for his prebendal house. The Dean and Chapter were made a body corporate by charter, 21st May, 2 Eliz. The prebendaries chuse their houses by seniority, and if they do not live in them, they may let them. They enjoy the profits of all their other estates jointly. The houses are repaired from the common fund.

Enjoyment in severalty of an estate vested in a corporation aggregate.

With respect to assessment, this house was contended to fall within st. 38 G. 3. c. 5. s. 25. which makes an exception in favour of colleges and halls in Oxford or Cambridge, Winton, Eton, or Westminster, or the college of Bromley, for the sites of their buildings, or the masters of public schools, or any hospitals for their revenues, &c. The vote was principally objected to upon the principle of the messuage being the estate of the corporation, enjoyed in severalty by the owners, according to an agreement among themselves. The committee held the vote to be bad.

Rev. John Wingfield, second Master of Westminster school. He is appointed by the Dean and Chapter; and upon his appointment becomes a member of the corporation. He receives a stipend, and is also entitled to a house in Westminster, part of the corporate estates, by virtue of his office, which is for life. The vote was determined to be bad.

The committee, in all cases where it was necessary to prove the title of the voter, required the production of his

Title deeds required to be produced in proof of title.

\* This exemption is omitted in stat. 20 G. 3. c. 17.

\* The Gloucestershire committee resolved, p. 136. "that the voter, being part of a corporate body, comprised of

a custos and eleven vicars of Hereford, had not a right to vote at the last election for the county of Gloucester, for his part of the estate vested in the said corporation.

title-deeds. But on account of the great trouble and expence which would have been occasioned by bringing up the subscribing witnesses to those deeds, an agreement took place, for the mutual convenience of both parties, that they should be admitted in evidence without proof by the subscribing witnesses.

Certificates  
of marriage.

Probate of  
wills.

Where a  
conveyance  
is referred  
to.

It may here likewise be mentioned, although perhaps not strictly falling under the present head, that in proof of marriage, they required the production of an attested copy of the register<sup>c</sup>. In the case of wills, they admitted the probates in evidence<sup>d</sup>, in consequence of an agreement between the parties that such should be admitted: but an exception was made of cases where there might appear a doubt as to the validity of the will.

29th March. Tims Kight. Where it appeared there had been a deed of conveyance to the voter of a share in a public company, the entry of the voter's name in the dividend book, and register of the conveyance in the books of the company of which he was a sharer, was held not to be a sufficient proof of his title to the share for which he voted, without the actual production of the conveyance.

5. No case occurred of sufficient importance to be reported, of the voter's having an interest less than freehold in his estate. See *ante*, p. 91, 92.

<sup>c</sup> It would have been highly improper for the reporter to have omitted the two preceding rules of the committee, since they are of so much importance: it must be confessed, however, that, as general rules, they are liable to strong legal objections; since no maxims are more clear, than, that possession is *prima facie* evidence of a freehold, and reputation (in general) of marriage. The reader will remember, that it was required of the party supporting the vote to shew the voter's title, where a dis-

ferent proprietor appeared upon the assessment; (*ante*, p. 68.) or, where an exemption was claimed from assessment, on the score of office, (*ante*, p. 88.)

<sup>d</sup> The same agreement was made in the case of Gloucestershire, p. 186, 187. The House of Commons, in the case of Oxfordshire, 1753, (27 Journ. 64.) resolved to receive the probate of a will to disprove the voter's title. They referred to the cases of Great Marlow, 17 Jan. 1744, and Wendover, 17 Apr. 1735.



Questions relating to the estate of the voter : arising, 6. From the time of his possession of it.

18th June. Samuel Owen. On the assessment, the name of the Duke of Portland appeared as the proprietor. To derive the title from the Duke to S. O. a conveyance was produced dated June 1802, with an indorsement of the same date, by which the receipt of 650*l.* the purchase money, was acknowledged. It was proved, that the agreement for the sale of the estate was made long before the election ; and that according to the terms of that agreement, the voter was to be let into possession, when the purchase money was paid ; and that in fact the money had been paid a considerable time before the election. The witness was unable to speak to the precise time, but he was sure that the Duke had ceased to receive the rents in 1799. It was observed in support of the vote, that nothing was more common than to acknowledge the receipt of the consideration-money on the back of the conveyance, as of the same day as the date of the deed, although in fact it might have been paid long before. The vote was allowed <sup>v</sup>.

The acknowledgment of the receipt of the purchase-money not evidence of the time of the voter's possession.

This question upon the year's possession was not specifically made against the voter, but arose from the date of the conveyance put in to prove his title, and to account for the variance between the assessment and the poll, as to the name of the proprietor. See *suprà* p. 68.

Rev. G. Bailey. It was admitted that a person married during the election had a right to vote at the same election, for premises to which he became entitled by the marriage <sup>x</sup>. See ft. 18 G. 2. c. 18. s. 5.

Marriage during the election.

<sup>v</sup> Where the voter for the first time contracted for his freehold within a year before the election, and received the rent due from the Lady-day preceding, which was more than a year ; the Bedfordshire committee disallowed the vote. 2 Lud. 540. The Bedfordshire com-

mittee allowed the vote, where the voter had been long in possession, though some of the consideration-money had been paid within the year. 2 Lud. 540.

<sup>x</sup> The same point was decided by the Bedfordshire committee, in the case of Robert Saunders, 2 Lud. 427.

VI. Questions relating to the person of the voter : in respect,  
1. of office.

Collector of  
duty on win-  
dows, &c.

2d June. Joseph Jollands. He was objected to as being a collector of the duty on windows and houses, and as such disqualified by the st. 22 G. 3. c. 41<sup>1</sup>. Upon reading the statute, little resistance was made to the objection by the counsel on the other side, and the vote was admitted to be bad. But in the case of Edward Staples, (5th June) against whom the same objection was made, and who appeared to have been appointed by the commissioners of the land-tax, at the same time with the preceding voter, the counsel in support of the vote having had a further opportunity to consider the statute, contended that he was protected by the second section of the statute<sup>2</sup>, and cited the case of Thomas Barringer, 2 Lud. 551. where it was held, that a collector of the duties on windows and houses, appointed by the commissioners of the land-tax, was not disqualified. The arguments made use of on each side, were the same as those reported in Barringer's case, and therefore are not repeated here. The committee decided that the vote was good; but refused to restore the vote of Jollands to the poll<sup>3</sup>.

### Questions

<sup>1</sup> Sect. 1. forbids certain persons to vote at elections, among whom are "any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving the duties on windows or houses."

<sup>2</sup> Sect. 2. contains a proviso that the act shall not extend to commissioners of the land-tax, or persons acting under the appointment of such commissioners "for the purpose of assessing, levying, collecting, receiving, or managing the land-tax, or any other rates or duties already granted or imposed, or which shall hereafter be granted or imposed by authority of parliament." By st. 20 G. 2.

c. 3. and 38 G. 3. c. 40. the management of the duties of windows and houses is placed under the control of the commissioners of the land-tax, who are to appoint the collectors.

<sup>3</sup> The Bedfordshire committee negatived the following motion; "That any collectors or assessors, appointed by or acting under the commissioners of the land tax, whether acting as such, or as commissioners for the management of the duties on houses and windows, or for the management of any other rates or duties imposed or to be imposed by parliament, are disqualified from voting at elections of members to serve in parliament."

Questions relating to the person of the voter : in respect,  
2. of the receipt of alms.

14th April. Philip Harrison. In the assessment, the entry was, " Philip Harrison, poor." The voter was a day labourer, and had for several years been the owner of two small freehold cottages. The land-tax had never been collected from him. His vote was allowed <sup>b</sup>.

Payment of  
land tax  
excused.

Questions relating to the person of the voter : in respect,  
3. of being an alien.

16th April. P. Eleazar Solomons, was objected to as being a foreigner. The evidence to support this objection was the testimony of a witness, who swore he had obtained letters of denization for the voter in the year 1797. It was also proved that the estate, for which he had voted, had been conveyed to trustees for his use before the obtaining of these letters. It was admitted that a denizen might vote, but it was contended, that in this case, it appeared that he was an alien when he took his freehold, and that therefore it never legally vested in him; that as in these circumstances, he was incapable of taking a freehold in land to himself, he could not take it by a trustee, but that the title was in the king. See 1 Heyw. 157. But it was answered, that the clear law was, that the king was entitled only upon office found, and that the alien holds his estate subject to

A denizen  
may vote for  
a freehold  
acquired be-  
fore denisa-  
tion.

liament." 2 Lud. 551. It is also said, that a similar objection was over-ruled by the Buckinghamshire committee. The principal arguments used, in the Bedfordshire case, in support of the vote, were, that the first section of the statute contemplated officers of a higher description, and not such collectors as these, whose appointment was not by the Treasury; was compulsive; of very small emolument; and was a duty they could not refuse, or resign.

<sup>b</sup> This resolution might have proceeded upon the ground that the assessment was not evidence to support the

objection; or, that the excuse of the land-tax on the ground of poverty, is no disqualification. It furnishes, however, an authority to shew, that the mere assessment is sufficient, and that payment of the rate is not necessary. The Bedfordshire committee negatived a motion, " that parish alms paid to a freeholder do invalidate his vote, although he continues in possession of a freehold of the clear yearly value of 40s." The Cricklade committee held them to be a disqualification, if received within 12 months before the election. 2 Lud. 564. 567.

be divested of it by the office found: but that inasmuch as he had been made a denizen, and capable of holding lands, before any inquisition was sued out for the crown, the freehold was in him absolutely and indefeasibly. The committee decided the vote to be good.

Evidence of  
being an  
alien.

28th May. Anthony Barbre. Objection, "Alien." The chief clerk of the Alien Office produced the returns made by the aliens at the different police offices, under the alien act. Therein appeared a declaration signed by the voter, 31st July 1798, that he was born at Paris, &c. A book was also produced by the same witness, containing a memorandum of a licence granted to him pursuant to the same statute. This was admitted to be sufficient evidence of his being at that time a foreigner; and no proof being given that he had since been naturalized, his vote was declared bad.

## VII. Questions relating to evidence.

### 1. Who is permitted to be a witness, or to produce written evidence.

A trustee  
not permitted  
to produce a deed  
without the  
consent of  
the *cestui que*  
*trust*.

26th May. Joseph Lifford. Objection, "no freehold." To impeach his title a person was called, to whom he was said to have conveyed his estate in trust for the benefit of his wife, on a separation taking place between them. The witness was the trustee, and was called upon to produce the deed of trust, and to give evidence of the contents of some other deeds, proved to have been burnt: and it was said, that the wife's consent to the production of the trust-deed was not necessary. It was answered, that the rule, which the committee had acted upon, was, that he who had no interest in the deed, had no control over it; and that this principle extended to the present case. The committee resolved, that a trustee may not, without the consent of the *cestui que trust*, produce a deed, or give evidence of the contents of a deed that has been destroyed<sup>d</sup>. See *post*.

17th

<sup>c</sup> See *Marg. and Eutler's Co. Lit.* 2. b. notes 3, 4, and 5.

<sup>d</sup> "A trustee may be a witness against his trust," by Hale, C. J. but Twyden

doubted thereof. *Trials per Pais*, 317. ch. 15. But Holt C. J. refused to admit a witness, because it appeared, that he was privately entrusted by both parties

17th May. Henry Davison. Freehold, "Lincoln's Inn." Objections, "No freehold. Not duly affected." To prove that he had no freehold, Thomas Lane, the steward of Lincoln's Inn was sworn as a witness. He had been previously served with the chairman's order to produce the books of the society in his possession. This order upon him was considered by the committee as an infringement of a rule laid down by them 17th April\*. Two of the benchers of Lincoln's Inn had the day before attended, and informed the committee that Mr. Lane had no authority to produce any documents belonging to the society, and that the order ought to have been served upon the benchers. In consequence of this, an order upon the benchers was drawn up, but the chairman refused to sign it. A notice had also been served on the benchers, on the part of the sitting member, to produce the same documents, and another notice upon the voter, to produce his title deeds. On the day before, these books had been produced by Mr. Lane, by the desire of the counsel who appeared in support of the titles of the voters objected to; and this day, he produced an order from the society, in which he was directed to produce the documents, &c. *only in support* of the titles of the voters. He said he had no authority from the voter himself to produce any thing relating to his title. The counsel for the sitting member then insisted on a right to examine Mr. Lane as to the contents of these documents, since the voter had failed to produce his original title deeds, after notice. The counsel for the petitioner objected *in toto* to any evidence Mr.

Steward of Lincoln's Inn not permitted to produce documents of that society, to impeach the title of voters claiming under them.

parties to make the bargain, and to keep it secret. "And (by him) a trustee shall not be a witness, in order to betray the trust." 1 Ld. Raym. 733. B. N. P. p. 284. In an action against a bankrupt, the plaintiff, to prove the certificate fraudulently obtained, subpoenaed the solicitor under the commission, with a *duces tecum* of the proceedings. Lord Kenyon held, that he was not only not bound to produce them, but that it would be criminal in him to do it: they were not his papers, but

those of his clients, the assignees of the bankrupt's estate. *Bateson v. Hartfinck*, 4 Esp. Reports, 43. He added, that it would be a most dangerous doctrine, to hold, that if one man's title-deeds were accidentally in the hands of another, he might be called upon to shew them by any man who came with a *subpoena duces tecum*; that if such were the law, no purchaser for a valuable consideration would be safe. MS.

\* See *post*, of compelling the production of evidence.

Lane might give to impeach the title of the voter. They said, that he who is in possession of title deeds, as agent, or trustee for the person interested, is not at liberty to produce them, without the consent of that person: that the same rule extends to copies of deeds, and also to parole evidence of their contents; otherwise it would be entirely nugatory: that Lane was the agent, and the steward, both of the society, as a body, and of the individual voters, or tenants; had the benchers given him authority to produce these books in evidence against their tenants, still he would not have been at liberty to do so, without the permission of the tenants themselves; that, on the other hand, in defence of their titles, they had a right to the use of them; and if the bench had denied them the inspection and use of them, the courts of law would have compelled them to grant it; that the same rule of law held with respect to lords of manors, corporations, &c. who, where they are by particular circumstances constituted the *custodes* of the muniments of private titles, are obliged to produce them in support of the titles, but are not at liberty to do so, to impeach them at the requisition of a stranger. The counsel impeaching the vote, however, persisted in requiring of Mr. Lane to turn to the admission of Mr. Davison, in the books of the society; but the committee would not permit it to be done. The objection of non-assessment was then resorted to, and it appeared that the Hon. Booth Grey was assessed as proprietor in 1801. This making it necessary for the title of the voter to be proved, and to be deduced from Mr. Grey, the book was produced at the desire of the counsel for the petitioner, who supported the vote: and the admission of Mr. D. appeared to have been 12th February, 1802. No other evidence being given of an antecedent contract, or possession, the vote was declared bad.

Steward of a manor called to produce the court-rolls.

23d May. Henry Pratt. Mr. Thomas Tibbutt, the steward of the manor of Hackney, was called as a witness on the part of the sitting member, (who objected to the vote) and required to produce the court-rolls of the manor, to prove that the estate, in respect of which the vote had been given, was copyhold. He said, upon being questioned,

that he had no particular authority either from the lord of the manor, or from the voter, to produce the entry on the rolls relating to this property : that he had been authorized generally, on the part of the lord of the manor, to do, at all times, any thing which he considered to be for the good of the manor. He also said, that he had no objection to produce the rolls. The production of them was objected to on the part of the petitioner, since neither the consent of the lord of the manor, nor of the voter, had been obtained thereto. It was answered on the part of the sitting member, that the committee would not exclude the best, and the only evidence, by which the objection to the vote could be established : that the consent of the tenant was not necessary ; since his dissent, for the purpose of concealing the defect of his own vote, ought not to prevent its production : and that the dissent of the lord of the manor should be expressly proved ; whereas here, it did not appear either that the lord or the tenant had any objection to the rolls being produced. Although the court-rolls of a manor are in some respects the muniments of private titles, yet they are in their nature public documents, and accessible by all who have an interest in their contents ; and the sitting member has, in this instance, an interest, to shew from them that the voter's estate is copyhold, and not freehold. It cannot be contended, that if the lord had given his consent, the consent of the tenant is material ; for if so, no person out of possession, who claims a copyhold estate, can ever prove his title in a court of justice. An heir at law who has been admitted, might prevent another who claims as devisee, from shewing the admission of the devisor, or his surrender to the use of his will, which would be necessary proof in support of his claim. The court-rolls are the entries of proceedings in a court of justice ; to which all persons may have access : it is for that reason, that copies of them are evidence. See Gilbert's Law of Evidence. p. 74. (Edit. 1777.) " Of the public matters that are not records. The rolls of the court baron, or the copies of them, for they are courts of justice, though they are not of record. The court-rolls are evidence, or the copies of them ; for they are the public rolls,

Objection to  
the evi-  
dence.

Argument  
in support  
of it.

Power of the committee under the order of the House.

rolls, by which the inheritance of every tenant is preserved, and they are the rolls of the manor court, which was anciently a court of justice, relating to all property within the district." Lastly, the committee have a right, in execution of the power given them by the house "to send for all persons, papers, or records," to require the production of these documents, for the purpose of detecting a fraud, and of advancing the justice of the case: and although it may be admitted that this authority ought not to be exercised to such an extent as to force from the custody of any individual the muniments of his private title, yet it may fairly be employed to compel the lord of a manor, or his steward, to produce the proceedings of his own courts, which are of a more public nature. Such an authority is commonly exercised by the ordinary courts of justice. It is also to be considered, that in this case, the object of the evidence is not to devalue the voter's estate, or to affect his title to it; but only to shew that he enjoys it by a different title, from what he has represented at the poll.

Argument against the evidence being produced.

The counsel for the petitioner, in reply. It is admitted that if a court of justice would allow the court-rolls to be produced in such circumstances, this committee will do so likewise: but it is denied that they are such public documents into which every one has a right to search; and it is also denied, that the sitting member has any such interest as will entitle him to the inspection of them. So far as they contain the titles of several persons, they may be called, in some sense, public books; but inasmuch as they respect the title of an individual, they are as private as any other title-deeds, and as much subject to the control of that individual. The passage cited from Ch. B. Gilbert is not to be understood as applying to questions of private title, but to judicial proceedings in the court-baron; for with respect to private titles, the law has been frequently determined to be otherwise. In the case of *Talbot v. Villeboys*, M. 23 G. 3<sup>f</sup>. the court of King's Bench, in a question whether certain lands were part of the manor of the plaintiff, or of the defendant, refused the defendant a rule to inspect the court-books of the

<sup>f</sup> Cited by Buller, J. 3 Term Rep. 142.

plaintiff.



plaintiff. In the case of *Smith v. Davies*, 1 Will. 104. where the lord of the manor claimed certain lands as copyhold, which the defendant asserted to be freehold, the court refused to grant to the defendant a similar rule, because "the plaintiff was not obliged to assist the defendant in making out his title." And in the case of the *Bishop of Hereford v. the Duke of Bridgewater*, Bunb. 269. where a bill had been filed against the defendant and others for tithes, an inspection of the court-rolls of his manor, to see in what proportions a certain modus had been paid, was denied to the plaintiff. Neither if the lord had given his consent, would the production of the court-rolls, without the consent of the tenant, be allowable. In the case supposed by the counsel on the other side, the devisee of the copyhold would derive his title through the admission of a former tenant, and upon that ground, he would have an interest in the court-rolls. But here the production is demanded by a mere stranger, who claims nothing in the manor, either as lord, or as tenant, or through a tenant.

The committee determined that the consent of the lord of the manor must be proved, before the court-rolls were produced \*.

24th May. Same vote. The question was again discussed, and the committee determined, that as Mr. Tibbutt had declared that he considered himself authorized by the lord of the manor to make any use he pleased of the court-rolls, consistently with his duty as a steward, he was at liberty to produce them or not, as he pleased. Mr. Tibbutt refused to produce them.

He was then asked by the counsel impeaching the vote, whether he did not know, in point of fact, that the name of the voter appeared on the rolls, as having been admitted to the premises for which he had voted? The witness expressed his wish not to give any account of the contents of the rolls: and the committee determined that the question should not be put.

*Decision.*  
Steward may  
not produce  
the rolls  
without the  
consent of  
the lord.

*Need not  
give evi-  
dence of  
their con-  
tents.*

\* They at first determined, that the consent both of the lord, and also of the tenant, was necessary: but on the fol-

lowing day, they rescinded so much of the resolution, as related to the tenant.

Copy of admission procured from the voter, given in evidence.

Upon this, a witness was called, who said that he had visited the voter on the preceding evening, and had asked him, on the part of the sitting member (who objected to the vote) for the title-deeds of the estate for which he had voted; telling him, at the same time, that he was at liberty to withhold them, if he thought proper: that the voter without hesitation delivered to him the instrument produced by the witness. This instrument appeared to be an admission to a copyhold estate; and the premises described therein agreeing with the description of the voter's estate on the poll, and the petitioner not being prepared to shew that he had any freehold estate corresponding with that description, the committee determined the vote to be bad.

The lord of the manor having forbidden the production of the court-rolls, the bailiff's accounts rejected.

24th May. William James French. Objection, "No freehold." It was proposed to prove that the premises, for which he had voted, were copyhold. The steward of the manor being called as a witness, declared that he had the express directions of the lord of the manor, not to produce the books of the manor<sup>b</sup>. A person was then sworn, who offered to produce a book of account, from which certain rents due to the lord of the manor were computed and collected. The witness was the son of the bailiff of the manor, and had collected the rents, by the book, for many years. It was proposed to shew that they were copyhold rents, and that the voter had paid them for the premises for which he had voted. It was contended on the part of the petitioner who supported the vote, that the witness should not be suffered to produce this book; and that the prohibition given by the lord of the manor to his steward, must be held to extend to documents in the hands of his bailiff, who was an inferior officer. The committee decided that the book should not be produced. The witness being further examined, said that he had collected these rents from the voter: but the committee did not consider this as sufficient evidence of the premises for which he had voted being copyhold, since, (as was suggested by the petitioner's counsel) it did not appear but that they might be paid by freeholders who owed services to the manor. The vote was declared to be good.

<sup>b</sup> See the preceding vote,

29th May. James Driver. Objection, "No freehold." It was proposed to prove that the premises for which he voted were copyhold. Mr. W. Langmore, the steward of the manor of Stepney, (in which the premises were situated) produced the copy of an admission, signed by himself. He said, he considered himself bound to give a copy of any admission to any person who applied to him for it. He admitted, that he had received the direction of the lord of the manor not to suffer any person to inspect the court-rolls. Mr. Tibbutt, the steward of the manor of Hackney, (being questioned upon the subject) informed the committee, that, with respect to the practice of giving such copies to persons who applied for them, he considered himself bound to give them, as a matter of course, even to strangers, upon their application, and upon payment of the usual fees; except where there might be good reason to believe that the application was made for some purpose hostile to the interests of the lord, or of a tenant. Upon Mr. Serj. Lens rising to oppose the production of this evidence, it was suggested by the counsel for the sitting member that the objection could be made by no other than by the lord of the manor; the committee having determined that his consent only was material. The room was cleared; after some deliberation, the chairman informed the counsel, that the committee considered the first question to be, whether any indifferent person had a right and legal claim to demand of the steward a copy of the court-rolls: that, if any body had a right to demand them, it would follow of course that any body might make use of them in evidence; but that the committee desired to hear that point argued. The other question, whether, in these particular circumstances, the evidence proposed was admissible, would remain to be discussed, if the first question were decided in the negative.

A stranger not entitled to a copy of the court-rolls.

The counsel for the petitioner argued in the following manner against the production of the evidence:

The consideration of the nature of the property now under consideration, furnishes a sufficient answer to the question; it is private property, and the court-rolls being the muniments of the title to it, all such persons as are interested

Argument against the production of the evidence.

interested

interested in the title, and no others, have a right to them. It follows also from the nature of the property, that they must be deposited with one person for the use of all. The lord has in him, as a deposit, the rights of all the tenants. The freehold is in him; but he is constrained by the law to preserve the rights of his tenants, and to assist them in maintaining those rights, according as the custom of the manor prevails, by which his will is limited and controlled. Being the depository of the rights of his tenants, he is also the depository of the muniments of those rights, namely, the court-rolls. The cases cited in the argument upon Pratt's vote<sup>1</sup>, prove that these are not public rights, nor are the rolls, as public records, open to the inspection of every one. To these cases may be added those of *Crew v. Saunders*, 2 Str. 1005. where it is said, "Inspecting court-rolls was the original of these motions" (for inspection); "but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand." And in the case of the *King v. Allgood*, 7 Term Rep. 746. a freehold tenant of the manor having applied for an inspection and copies of the court-rolls, stating only, that he was such tenant and had occasion to inspect them, the court expressed themselves of opinion, that "unless some cause were depending, (*i. e.* where he was concerned,) the tenant had no right to call for an inspection of the court-rolls." It need not be contended, that whatever duty lies upon the lord to preserve the titles of his tenants, and to prevent the inspection of them by improper persons, the same duty lies upon his steward<sup>2</sup>.

Argument  
for the pro-  
duction of  
the evi-  
dence.

Argument for the sitting member. This is not a question of inspection, which implies a general search through the records, for whatever may be found there of use to the person who has obtained the order for that purpose. Even if that were the question, the case of *Liskeard*<sup>1</sup> in the present session shews that the House of Commons does not con-

<sup>1</sup> *Ante*, p. 122, 123.

<sup>2</sup> See the cases upon the subject of inspection granted by courts of law, very ably arranged by Mr. Nolan, in his

Note to the case of *The King v. The Fraternity of Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223.

<sup>1</sup> Reported, *post*.

sider itself bound by the rules which prevail as to this subject in the courts of law. The Speaker, at the instance of Mr. T. Sheridan, granted a general order for the inspection of all the papers, and records of that borough; and his agents, by virtue of that order, spent three months in searching for evidence. The granting, or denial of inspections by other courts, seems to have been frequently a matter of discretion. In the case of the *Mayor of Lynn v. Denton*, 1 Term Rep. 689. which was an action for tolls, the defendant claimed an exemption as freeman of London; and the court granted him an inspection of the books of the corporation of Lynn without suffering the matter to be discussed, saying, that it had been the general practice for many years, to grant such applications. But the question here, is, whether or not, the particular document being specified, the parties have not a right to a copy of it. It has been said, that they are private documents; so are wills; but they being deposited in the public court, any person at his pleasure may inspect or have a copy of them. So also, deeds that are registered in the county of Middlesex, under the st. 7 Ann. c. 20. are private muniments; but any person may inspect or copy them, and it is remarkable, that conveyances of copyhold estates are exempted by s. 17. from the necessity of being registered; which strongly shews that the legislature considered them without registration to be already as public, as other deeds were about to be made by the provisions of the statute. In some of the cases cited by the sitting member, the party applied for a general inspection; in others the evidence was to be made use of against the rights of the lord of the manor himself; these cases therefore are very unlike the present. Neither indeed does it follow if the lord were not bound to grant an inspection, that the steward is not bound to produce the admission, for in the case of the *King v. Dr. Purnell*, 1 Bl. Rep. p. 37. the court refused a rule upon the Vice chancellor of Oxford, for an inspection of the public books of the university, but admitted that the *Custos Archivorum* might have been compelled to produce his books<sup>m</sup>.

<sup>m</sup> See the cases collected in Com. Dig. Evidence, C. 2.

Reply.

The counsel for the petitioner in reply. The authority of the case of the Mayor of Lynn v. Denton began to be doubted very soon after the decision of it; see 3 Term Rep. 305. *in not.*: and in the case of the Mayor of Southampton v. Graves, 8 Term Rep. 590. it was expressly denied; and a similar rule for an inspection was refused. It is clear, that if the party is not entitled to a copy of the admission, he has no right to make use of it as evidence; for if he has a right to it as evidence in any shape, he may compel him who has the custody of it to produce it, or to give him a copy of it; and therefore, his having no right to the copy, shews, that he is not entitled to make use of it in evidence; and it is on this principle, that cases of granting inspection are in point to the present question. In the case of The King v. Dr. Purnell, it was a question upon the public duty of the Vice-chancellor, whose conduct was impeached; and the books might be more properly called public books. In the case of Liskeard also, the question was upon a public right, and not upon the title of any individuals; and there the inspection was not at all resisted by the burgesses. The instance of the registration of wills has been cited as analogous; but no precedent has been adverted to, where a will has been compelled to be produced; that they are made public (in the case of wills of personal property) depends upon the peculiar nature of the jurisdiction of the ordinary in such matters. The st. 7 Ann. c. 25. does not require the deeds themselves to be registered, but only the names of the parties, and the dates, &c. by which prior incumbrances may be discovered, and frauds prevented; but the register is not the depository of the deeds themselves, or of transcripts of them.

Decision.

The committee determined, that a stranger to the manor is not entitled to claim a copy of the court-rolls without the consent of the lord of the manor. Mr. Plumer then tendered a copy of an admission in evidence on the part of the sitting member: the evidence was objected to, and the committee, after deliberation, determined, "that as it appeared in evidence that the lord had refused the production of the court rolls, the copy should not be received in evidence, unless

Copy of admission so obtained, rejected.

unless it could be proved that the lord had consented to its production." The vote of James Driver was afterwards determined to be bad, upon the ground of his having given in a wrong occupier.

30th May. William Mason. Objection, "No freehold." It was proposed to prove that the premises for which he voted were copyhold of the manor of Stepney. To prove this, a witness of the name of Wornall was called, who produced a copy of his own admission to a copyhold tenement in the manor. He said, that as a copyholder of that manor he had demanded of the steward a copy of the voter's admission, and had obtained it: and he offered to produce it. He admitted, on cross-examination, that he had no interest in Mason's estate. The production was objected to. The counsel for the sitting member contended for the admissibility of the evidence, in the following manner:

Tenant of the manor not entitled to the copy of the admission of another tenant.

It cannot be denied that a copyholder of the manor has a general right to inspect the court-rolls, or to take copies of them; whether they relate to his own right, or to the rights of the other tenants. This was expressly decided in the case of *The King v. Shelly*, 3 Term Rep. 141. There it was said, that the persons making the application having all of them burgages, had an interest in knowing who besides themselves held by the same tenure. In *The King v. Allgood*<sup>m</sup>, where the application for a mandamus was refused, it had been made by a freehold tenant, who *prima facie* was not interested in knowing who were copyholders. In the case of *The King v. Babb*<sup>n</sup>, which may be cited on the other side, the court of King's Bench held a rule for permitting three aldermen of the corporation (the relators) to inspect all papers, sufficiently complied with by the town-clerk, although he only permitted the inspection of such papers as related to the particular questions in the cause. But it must be remembered, that that was the case of a criminal proceeding, viz. an attachment against the town-clerk; and besides, the inspection was granted by a rule of the court; which, consequently, could only be held to apply to the cause then before the court. These cases,

Argument for the production of the evidence.

<sup>m</sup> 7 Term Rep. 746.

<sup>n</sup> 3 Term Rep. 581.

therefore, do not interfere with the general rule laid down in *The King v. Shelly*; and it is submitted, upon the authority of that case, that this witness had a right to claim a copy, either without avowing his purpose in so doing, or avowing that his purpose was to see, who, besides himself, had title to copyholds within the manor. If he has a legal right to the possession of the instrument, he is at liberty to produce it in evidence: he is even compellable to do so. It is not offered for an illegal, but for a commendable purpose; neither is the object of it to take away any legal right from the voter. Secondly, although it had been obtained improperly, surreptitiously, or even illegally; still, being produced in court, and duly authenticated, the court will receive it in evidence, and not inquire in what manner it has been obtained. It is well known, that the only proper method of obtaining the copy of an indictment, is by the order of the court, which is either given or denied at discretion. But where in an action for a malicious prosecution, the plaintiff has provided himself with a copy of the indictment, the court has always refused at the trial to inquire whether or not it has been regularly<sup>o</sup> obtained. In the case of *The King v. Le Merchant*, 2 Term Rep. 201. *in not.* copies of letters surreptitiously procured were allowed to be read in evidence. And in *Dr. Dodd's case*<sup>p</sup>, it was held, that a prisoner could not avail himself of the objection, that an accomplice had been carried before the grand jury as a witness, under an illegal, or a surreptitious order.

<sup>o</sup> In *Jenman v. Cooke*, (which was an action upon the case for a malicious prosecution for felony at the sessions for the borough of Portsmouth) tried before Thomson, B. at the Lent assizes for Hants, 1804, it being objected by Lens, Serjt. for the defendant, that it did not appear that the copy of the record had been obtained by leave of the court, and that a copy of a criminal record could not be had without such leave, the judge held that as a sworn copy was produced to him, he could not inquire how the plaintiff came by it, but must receive it. And the plaintiff had a ver-

dict. MS. And see *Jordan v. Lewis*, 2 Str. 1122., where two being acquitted upon a joint indictment, and a copy of the indictment being granted to one, the other brought his action, and gave that copy in evidence. Lee, C. J. considered himself obliged to receive the evidence, and a verdict having been given for the plaintiff, the court refused to set it aside. In cases of misdemeanor, the copy of a record of acquittal may be had without its being granted by the court. *Morrison v. Kelly*, 1 Bl. Rep. 385.

<sup>p</sup> Leach. Cas. Cr. L. 184. edit. 1800.



De la Motte's letters were secretly opened at the post-office, and copies of them taken<sup>1</sup>; yet the copies were admitted against him in evidence.

Argument  
against the  
production  
of the evi-  
dence.

Argument for the petitioner. It has been already determined, that the steward shall not be permitted to produce the original court-rolls, without the consent of the lord of the manor; the question now is, whether a tenant, without such consent, may produce them? The case of the King v. Allgood was decided upon the ground, that even tenants of the manor were not entitled to copies, further than as their own interest was concerned. The case of the King v. Babb, proceeded upon the same principle, as applied to corporators. But if it was legal for the witness to obtain a copy of the court-roll, still he can no more be held competent to produce it in evidence for the present purpose, than the steward in the former cases, who without doubt was in the legal possession of the muniments themselves. First therefore, it is submitted, that the witness, though entitled to a general inspection for the purpose of searching for evidence of his own title, had no right to take copies of that which did not concern his title; and secondly, that even if he was entitled to what he has obtained, he is precluded by the decision of the committee, from producing it in evidence, the consent of the lord of the manor to its production not having been obtained.

Decision.

The committee determined that the copy should not be received. They suffered the witness, after argument, to relate, that in point of fact, he had seen the voter admitted to some premises in the manor<sup>2</sup>. This, together with some other evidence given, was not considered sufficiently to relate to the premises described on the poll; and the vote was determined to be good.

Parole evi-  
dence of ad-  
mission.

20th June. Arthur Bott. In the assessment, the Duke of Portland's name appeared as proprietor. To support the title of the voter, it was first proved, by persons in the employment of his Grace, that the Duke had ceased to receive the rent of the premises in 1797, and that he had no longer

<sup>1</sup> East's Pleas of the Crown, 124.

to produce his title-deeds.

<sup>2</sup> Notice had been given to the voter

Memorial  
evidence of  
the contents  
of a deed  
which the  
voter will  
not produce.

One em-  
ployed to  
draw a deed  
which the  
voter will  
not produce,  
shall not  
speak to its  
contents.

any title to, or interest in them. A notice was then proved to have been served (on the part of those who supported the vote) on the voter to produce his deeds. He refused to produce them; and it was proposed to put in the memorial of the registry of the conveyance, as evidence of the contents of the deeds. The committee determined, "that there being no evidence given to impeach the freehold, except the name of the Duke of Portland appearing as proprietor on the assentment, and it being proved that notice was given to Arthur Bott to produce his title-deeds, which he has not produced, the memorial of the conveyance from the Duke of Portland shall be admitted to remove the objection arising from the name of the Duke of Portland upon the assentment." It appeared from the memorial, that the Duke had sold the estate to Bott, subject to certain uses and trusts referred to in the memorial, but not specified therein. The committee held it necessary that it should be explained what these trusts were. Mr. Robinson being called as a witness, deposed, that he had been employed in the transaction as the agent of both parties. Upon this, the counsel who impeached the vote, objected to the witness giving any account of the contents of a deed, with which he became acquainted as the agent of the voter, when the voter had refused to produce the deed itself. The counsel on the other side, having no other evidence of the contents of the deed than what might be furnished by Mr. Robinson, began to contend, that it was unnecessary to go into any further evidence in support of the voter's title, since the title of the Duke of Portland was removed, and the only objection to the voter, arising from the Duke's name appearing upon the assentment, was done away. The committee however, held further evidence to be necessary; and with respect to Mr. Robinson's testimony, they determined, "That he, having been confidentially employed by Mr. Bott to draw the deed which Mr. B. refuses to produce, shall not be examined as to the contents of it." The vote was declared bad.

## 2. Who is compellable to be a witness, or to produce written evidence.

17th April. Job Kentish, a voter, was served with a summons from the chairman on the part of the sitting member, who objected to his vote, to produce his own appointment, as clerk of a parish. It was contended, that no man could be compelled by process of the court to produce evidence against his own vote; and that he could only be served with a notice, from the party, to produce it. The chairman informed the voter, that he was not bound to produce his appointment, if he chose rather to withhold it.

The voter  
not com-  
pellable.

This practice appearing to have taken place in several other cases, the chairman declared that it was irregular and improper to serve orders, or summonses on voters, to produce their title-deeds, and directed all such as had been already issued, to be recalled.

Resolution  
of the com-  
mittee.

5th June. William Macdowall. An order had been served upon a trustee to produce a conveyance from the voter of his estate in trust for the benefit of his creditors: no notice had been given either to the voter, or to any of his creditors. The trustee being sworn as a witness, refused to produce the deed; and the committee held that he was not compellable to do so. See *ante*, p. 118; and see *ante*, vol. 1. p. 98. case of Coventry.

A trustee;

See also, the cases under the preceding head,

## 3. Who is disabled in point of interest from being a witness.

29th February. Zachariah Duncan. It was proposed to call the voter as a witness, in support of his own vote, to prove who were his tenants at the time of the election.

A voter in  
support  
of his own  
vote.

\* A similar course was adopted by the Bedfordshire committee. See 2 Lud. 568.

\* The following motion was negatived by the Gloucestershire committee; "That the witness having acquainted the committee that he had a deed in his pocket, left with him as trustee of a marriage-settlement, but refusing to produce

it without order of the committee, the witness be ordered to produce the said deed." P. 23. The same committee held, that the agent of the party supporting the vote, who, as such, had obtained inspection of the title-deeds, could not be examined by the opposite party, as to the contents thereof. P. 79.

This was objected to. It was argued in support of the evidence, first upon principle, that the interest which an elector had in his vote, was not such as could disqualify him as a witness upon this trial: because, whatever his interest in it might be, it would not be affected by the event of the cause, since the determination of the committee would neither establish nor destroy his right to vote hereafter, nor could this decision be in any manner made evidence against him, or for him, on any future occasion\*: secondly, the cases of T. Ayre, W. Day, R. Taylor, and James Smith, 2 Lud. 405—409. were cited, where the voter was received as a witness upon the subject of his own vote. On the other side, the case of William Graves, *ante*, vol. 1. p. 76. was cited, and it was insisted that the voter had clearly an interest in supporting his own vote: that in the cases cited the voter had been received from necessity, to state that which he alone could best state, namely, the account he gave of himself at the hustings, and the candidate for whom he voted: but that in this case, proof might easily have been brought *aliunde*. The committee decided that the evidence was inadmissible.

To support his own vote by correcting the poll.

29th February. John Harding. In this case it was attempted to call the voter to prove that he described his freehold to be situate in White-horse-alley, Cow-crofs, instead of White-crofs-street, as it was entered in the poll. The committee determined, "That no voter should be allowed to give evidence to substantiate his own vote, or to correct the poll, as far as his own vote was affected."

A person in the same circumstances with

19th May. Thomas Ireland voted for chambers in Staples Inn. The Society of Staples Inn appearing on the assessment as proprietors, it became necessary to shew a title

\* The Gloucestershire committee would not permit a voter who had taken the freeholder's oath at the election, to be examined as a witness (though willing) to prove that he had no freehold. P. 80.

† See 1 Lud. p. 384. to 392.; and case of Weymouth, *post*.

‡ See *contra*, 2 Lud. 405. 507., 410.

where the committee admitted the evidence of the voter to prove that he had voted for both candidates; his vote having been taken down for one only. And see 1 Lud. 384. 392. They also admitted him as a witness to prove that he gave in other tenants besides those taken down on the poll. 2 Lud. 409.

in the voter derived from them. To prove this, Mr. Leeson was called, who had voted in right of chambers held under the society in the same manner as those of the voter were held. His vote had already been decided upon. His evidence was objected to; but it was received by the committee, since his own vote, having passed question, could not possibly be affected by the determination of the present case.

the voter,  
but whose  
vote cannot  
be affected  
by the ques-  
tion.

4. Of witnesses who have been in the committee-room during the trial.

13th April. Joseph Jones. To answer an objection made to this voter upon the score of assessment, a collector of the name of Hill was called as a witness. He was objected to, as having been in the room in the course of the same day. The usual rule for the exclusion of witnesses had been affixed to the door of the room, but after a few days of the scrutiny, it was entirely disregarded, and particularly in the case of the assessors and collectors, who being frequently called for, often remained in the room during the whole of the day. The committee upon this occasion, directed the witness to be examined. The next witness called, who was neither an assessor nor a collector, confessed, upon entering the box, that he had been in the room a considerable time; but as it appeared that for many days no objection of this sort had been made, nor any care taken on either side to exclude the witnesses, and that many persons had been allowed to be examined, who had passed the whole morning in the room, the committee determined that this witness also should be examined. And on the 17th April, the chairman pronounced it as the resolution of the committee, that the objection should not be taken advantage of in particular instances, but that if either party desired that it should be enforced, he should give previous notice of his intention: in which case, the committee would give directions that it should be rigorously enforced on both sides. This resolution arose from an objection being taken to the evidence of Philip O'Kelly, who had been present in the committee-room\*.

Rule for the  
exclusion of  
witnesses  
relaxed.

\* See 3 Ld. Gl. 229. 264.; and the case of Aylebury, *post*.

5. Of the reproof, or punishment of witnesses, for improper conduct:

Witness re-  
proved for  
misconduct.

8th March. One of the assessors of the land-tax, who had been summoned as a witness, was this day reprimanded by the chairman, according to the directions of the committee, for the inconsistent manner in which he had given his testimony; and he was informed, that if he was guilty of similar misconduct on any future occasion, the committee would think it their duty to make a report of him to the House of Commons. The committee further determined, that the assessment books produced by this witness should remain in the hands of the clerk of the committee.

Witness re-  
fusing to at-  
tend ordered  
into custody.

18th April. Benjamin Weal was summoned by an order from the chairman, as a witness for the petitioner. On being served with the order, he declared that he would not attend. This answer was reported to the House, and he was taken into custody of the serjeant at arms, by their order. A difficulty then arose, with respect to the power which the committee had of requiring the attendance of a prisoner in custody of the serjeant at arms. As to their power of requiring the attendance of persons in custody of other gaolers for debt, the instance of Sir Watkin Lewes was cited, for whose attendance an order was made in the case of London, 1804 \*, where he was a petitioner. In the case of Ilchester, 1804 †, not only the speaker's warrant had been granted, but a *habeas corpus ad testificandum* had been applied for and obtained, from the court of King's Bench, to bring up Sir Edward Price, also a prisoner for debt, as a witness before the committee. See 4 East's Rep. 587. The matter was postponed, in order that the chairman might have an opportunity of consulting with the Speaker upon the mode of proceeding most proper to be adopted, and he afterwards (21 April) informed the counsel, that the House had ordered, that whenever the committee required the attendance of the witness who had been

Committee  
permitted to  
send for him  
to give evi-  
dence.

\* See Journ. 14th and 18th June, 1804.

† Reported, *post*.

‡ Reported, *post*.

ordered

ordered into custody of their serjeant at arms, they might send for him<sup>b</sup>.

26th May. The committee determined, that any witness who does not answer when called for, and has been duly summoned, shall be reported to the House. Witnesses not present when called.

That if it appears that the witness has not attended owing to any written or verbal communication from the agents of either of the parties, the said party shall lose the benefit of his evidence, and such witness shall not be reported to the House<sup>c</sup>.

#### 6. Of written evidence.

16th March. John Beaumont. The Duke of Portland was assessed as the proprietor of the freehold voted for. A conveyance was produced from the duke to the voter, reciting that the premises were mortgaged, and containing a covenant on the part of the duke to pay off the mortgage, and afterwards to make a new conveyance to the voter. Then a deed of confirmation by the duke was produced, reciting the payment of the money lent, and a re-conveyance of the estate by the mortgagee. It was objected that this recital was no evidence of the re-conveyance: and the committee were of that opinion<sup>d</sup>. Recital in another deed.

29th March. Tims Knight. He voted for a share in Fulham Bridge. The assessment was upon the proprietors of Fulham Bridge: and it was held necessary that the voter should be proved to be one of the proprietors. The dividend-book was produced, in which the name of the voter appeared, as a sharer; but this was considered as not the best evidence, as it appeared that there was another book, in which the titles of the sharers were entered. Upon the production of this last, however, it was found to be merely Entry of the voter's name in the dividend-book, and register of a company, in which he had a share.

<sup>b</sup> See Journ. 18th, 20th, and 24th April, 1804.

<sup>c</sup> See also the entries in the Journals, 6th and 18th July, of the commitment and reprimand of Cyprian Willock, who was reported to the House for prevarication, by this committee. His evidence related to the provisions given to

the voters in the petitioner's interest.

<sup>d</sup> The Bedfordshire committee would not receive in evidence the contents of deeds in possession of the voter, till a notice had been proved to have been served on him to produce them. 2 Lud. 568.

a register of the conveyances under which the sharers claimed, and that the conveyances themselves (*i. e.* the real title-deeds) were in the custody of each sharer. The actual conveyance in this case not being produced, the vote was declared bad.

Certificate  
of registry of  
a deed.

13th March. Joseph Dowling. A certificate of the registry of a deed was offered in evidence, and objected to, as not the best evidence. The committee determined not to receive it.

Appoint-  
ment of  
parish clerk.

17th April. Charles Pegler voted for lands which he held as clerk of a parish. *Vid. ante*, p. 107. In the assessment, one Gurney was rated, whom Pegler had succeeded within a year before the election. To prove Pegler's title, a copy from the parish register, of an entry of the voter's appointment, was offered in evidence. It was said in objection to this evidence, that an extract from the register was only evidence with respect to the particular objects for which the law had caused the register to be made, *viz.* baptisms, marriages, and burials; but not with respect to every thing else that might happen to be entered there; and that with regard to the entry in question, it was no more than any other private instrument, the original of which should be produced. It was answered that it was a public instrument, relating to the whole parish; and the entry being made in a public book belonging to the parish, its contents might be proved by an attested copy. The committee received the evidence.

Register of  
the Charter-  
house, of  
the appoint-  
ment of an  
officer.

19th April. William Ramsden. *Vid. ante*, p. 72. The instrument by which the voter had been appointed master of the Charter-house, was proved to have been searched for in vain. The Register of the Charter-house being sworn as a witness, produced a book from his own office, in which all the leases and instruments under the seal of the governors of the Charter-house are entered, and which contained an entry, purporting to be a copy of the original appointment of the voter for life. The entry had been made by the predecessor of the witness, and the witness had never seen the original. It was objected, that the entry could not be received in evidence, unless it was authenticated by some one



one who had seen the original. In defence of the admissibility of the evidence, it was said, that considering the nature of the entry, and the custody from which it was produced, it might be received as of itself evidence of the voter's appointment : and the case of *Tyson v. Clark*, 3 Will. 552. was cited, where an old draft of a lease was allowed in evidence in the trial of a writ of right, although there was no evidence of a lease having been prepared conformably thereto. Secondly, it was contended, that it was admissible, as an entry in a public book, produced by a public officer of a corporation, as evidence of an act done by that corporation, namely, their appointment of the voter to be their officer, and their acceptance of him as such. See *R. v. Motherfell*, 1 Str. 93. In this point of view it was said to be of as high authority, as the original appointment would have been, if produced. In reply, it was denied that this was a public body ; and it was insisted, that their entries were no evidence in support of the rights of their own officers. The case in *Wilson* was distinguished from the present, by the circumstances of the paper produced ; the paper being in that case, of great antiquity. The committee determined to receive the evidence.

#### 7. Of parole evidence to explain written evidence.

See *ante*, p. 134. where it was determined, that the voter himself should not be admitted as a witness for the purpose of correcting the poll. And see p. 52.

20th March. John Bell. Situation of freehold, "Clarges Street." The counsel for the sitting member proposed to call evidence to prove that the voter at the poll stated his freehold to be in Archer Street ; and that the clerk had written Clarges Street by a mistake. The committee determined, "that evidence to correct the situation of the freehold as described on the poll, should not be admitted."

Voter as witness to correct the poll.

Evidence as to the situation of the freehold on the poll.

#### 8. Of hearsay evidence.

21st June. Joseph Broughton. In order to prove the voter to be owner of the premises for which he had voted, a witness was asked, whether he had heard from one Healey (the

Declaration of the tenant, to prove who was the landlord.

(the occupier) who his landlord was? This question was objected to, as being hearsay evidence; and it was said, that the occupier himself should have been called as a witness. In answer to the objection, the case of *Davies v. Pierce and others*, 2 Term Rep. 53<sup>c</sup>. was cited, where the declarations of a tenant were held admissible to prove of whom he held the land. The counsel on the other side distinguished that case from the present, by observing, 1. that the tenant in that case was dead, at the time that his declarations were received in evidence: 2. that they were received upon a question of boundary, whether certain land was parcel of one estate, or of another: and that in such cases, such declarations were admissible, as evidence of reputation. The committee refused to receive the evidence.

9. Of the confessions or declarations of the voter.

**Voter's statement to the witness of his christian name.**

— March. Thomas Murphy: affirmed, "John Murphy." The affessor said that the voter's name was Thomas, and that he had been affirmed by the wrong name, (*vide ante*, p. 67. But it appeared upon his cross-examination, that he had no other means of knowing the name of the voter, but his having lately heard it from the voter himself. The committee upon this ground rejected his evidence, and disallowed the vote,

<sup>c</sup> And see Cowp. 611. Littleworth v. Clarke, Winchester, Summ. Ass. 1804. Replevin for taking cattle. Cognizance by the defendant as bailiff of W. B. and F. lords of the manor of Bentworth Hall, for one year's quit-rent (6s. 8d.) for a tenement called Gatwick, held of the manor, whereof the *locus in quo* was parcel. Pleas in bar, 1. traversing that the *locus in quo* was parcel of the tenement called Gatwick: 2. traversing that the tenement was held of the manor at the rent of 6s. 8d. Dallas and Dampier for the defendant, having proved Henrietta Withers to have been a tenant of the manor, called a witness, who swore, that the *locus in quo* was part of Gatwick, and that he remembered one Crowcher

occupying Gatwick, and that Crowcher (who was dead at the time of the trial) while he was in such occupation, told the witness, that he held it of H. Withers. Lens, Serjt. and Burrough, for the plaintiff, objected to this evidence being received. But Lord Ellenborough, C. J. received the evidence, saying that Lord Kenyon had in several instances held it to be admissible: that it stood indifferent to the tenant who his landlord was; and, therefore, that his declarations on that point might be received; unless an interest in him could be shewn, to have one person for his landlord in preference to another. The defendant had a verdict on both issues. MS.

24th April. Henry Sampson Fry. The voluntary declarations of the voter since the election, with respect to the occupation of the premises for which he voted were offered in evidence, in order to invalidate his vote. It was objected that such declarations were not admissible against a third person, *viz.* the candidate, who had acquired a title, and an interest in the vote through the act of the voter: that there might be a difference with respect to the declaration of a voter made before the election: as in a question of title, declarations of the grantor before the grant made are admitted as evidence against the grantee, who derives title through him; but his declarations made after the grant are inadmissible<sup>f</sup>. To this it was answered, that the practice of committees to receive the declarations of voters in evidence was as uniform, and as well known as the practice of excluding voters as witnesses. That in fact, both these depended upon the same principle; a voter could not be a witness, because he was considered, to some, though not to all, purposes, as a party: that upon this footing, he was served, like any other party, with notice to produce papers; and if he failed so to do, their contents were received in evidence: that, if he could not be a witness, because he was a party, it followed that his declarations might be given in evidence as those of a party; and there was no difference whether they had been made before, or at, or after the election. In cases of bribery, the confessions of voters were received without objection, although made after the election; and no distinction could be shewn whether the vote was impeached for bribery or for any other reason. In the case alluded to, the grantor, after the interest in the estate had passed from him, would be an admissible witness, and therefore his declarations would not be received. In reply, it was admitted that hitherto the practice of committees had

Declaration  
of the voter  
since the  
election in-  
admissible.

<sup>f</sup> It is said, 2 Lud. 411. *in noc.* that the Cricklade committee received the declarations of the voter as to his right, made after the vote was given. In the case of Yorkshire, 1735, the House, having resolved to receive parole evidence to contradict what the voter had

sworn at the poll, determined also, (22 Journ. 604.) to admit evidence of what the same voter had confessed of his having no freehold: but whether that confession was made before or after the election, does not appear.

been to receive such evidence, and that from 2 Lud. 411. it appears to have been admitted by the Cricklade committee; but it was nevertheless contended that this proceeding had been erroneous, inasmuch as the voter had communicated an interest in his vote to a third person, which he was not at liberty to defeat by any subsequent acknowledgement: as a witness, he was clearly inadmissible, as he had an interest of his own to support: but it did not from thence follow that his declarations could be admitted to defeat the interest of others: what he had said before the election was evidence, because the candidate, when he acquired the vote, acquired only such an interest as the voter had to dispose of, and subject to all objections to which it might be liable in consequence of any admissions of the voter. The committee decided the evidence to be inadmissible.

The same question was again argued on the vote of W. Harman, May 26, where it was again decided that the evidence was inadmissible.

Information  
gained from  
the voter by  
the adverse  
party since  
the election.

23d May. Henry Pratt. This voter had been served with an order to produce his title-deeds. See *ante*, p. 120. He had shewn to the witness who had served him with the order, some copies of admissions to copyhold premises, and had permitted him to take extracts from them. They were objected to, first as an account given by the voter of his titles since the election; (see the last case.) Secondly, as having been procured unfairly from the voter, and as being unfairly taken advantage of, against him. The committee resolved not to receive these extracts as evidence against the title of the voter.

Declaration  
of the voter  
after the  
election.

26th June. William Pepperday. In this case, the counsel for the sitting member proposed to give in evidence a declaration of the voter to a person immediately after the election, that he had no right to vote. The committee determined that it could not be received.

#### 10. Evidence of particular facts.

Evidence of assentment, see p. 40, 73, of marriage, p. 114. of title, p. 69, *in not.* 114. of wills, p. 114.

Adjourn-

## Adjournments of the committee by leave of the house.

On the 28th of March the committee had the leave of the house to adjourn till the 9th of April for the Easter holidays. On the 10th of May leave was given to Sir W. Wynn to attend a court martial on the Monday and Tuesday next, and for the committee to adjourn for those days. A precedent was read from the journals, 11th Feb. 1791, of leave given to Mr. Pelham, serving on the Okehampton committee. The committee also obtained leave to adjourn over the day appointed for the general fast: and for his Majesty's birth-day. See Journ. 23d May, and 1st June, 1804.

Adjournments by leave of the House.

## NOTE (A), from page 11.

Upon the division of cases before committees.

Committees of election have made their determination upon particular points in the course of the trial of the petition, frequently at the request of both parties, and frequently from their own sense of the propriety, and expediency of such a mode of proceeding. Lord Glenbervie says, (1 vol. Introd. p. 63.) "though the established method seems to be, that the counsel for the petitioners begin by opening the whole of their case, yet, when it happens to consist of several questions, and the determination of one would render the discussion of the others unnecessary, (as, for instance, if the objections to a sitting member are, first, that he was not eligible; and, secondly, that he had not the majority of legal votes) the committee will then, with the consent of the parties, divide the case into separate questions." And he refers to the cases of Bristol, vol. 1. p. 246. Dorchester, 1. 348. Bedford, 2. 71. Lanark, 2. 368. (and see Not. (2.) 2d edit.) North Berwick, 2. 426. And see note (U), vol. 1. p. 87. In the case of Cardigan, 3 Ld. Gl. 187. the agents on both sides were directed to arrange the different classes of votes; and the questions, arising from the circumstances of each class, were separately argued by the counsel, and decided upon by the committee. Cricklade, 4 Ld. Gl. 17. The case was divided into separate questions, both as to the right of election, and the separate classes of votes, at the proposition of the counsel for the sitting member,

member, and with the concurrence of the other side and of the committee. Cricklade, 2 Lud. 336. "It was agreed between the parties, to treat the whole case respecting the borough votes first and separately, in order to obtain a decision upon it from the committee."

In the case of Seaford, 3 Lud. 35. there were three parties. Two of them concurred in desiring a particular point (respecting the right of election) to be separately determined upon, and in the first instance; the third party would not consent; but the committee determined, that the separate question should be first argued. Honiton, 3 Lud. 164. (A). The petitioners having finished the opening of their case, the sitting member proposed immediately to shew, that the petitioner himself was ineligible (his former return having been avoided for bribery): for the petitioners it was argued, that the committee were bound first to hear the whole of their case: but the committee resolved, "that the sitting member might proceed to produce evidence of the ineligibility of the petitioning candidate." Downton, 3 Lud. 176. The proposal of Mr. Conway, that the opinion of the committee should be taken upon each vote or case as it was brought forward, was resisted by Mr. Bouverie, as an unusual thing, and inconvenient to him: and the committee determined, "that the counsel on the part of Mr. Conway should go through their whole case." And see 3 Lud. 407. Dorchester, 1 Fra. 325. The petitioner proposed, that the question respecting the right of election should be first argued: the counsel for the sitting member insisted upon their right to have the whole case of their adversaries disclosed to them, before they were called upon for their answer; but the committee decided, that the counsel should discuss the right, before they proceeded to other parts of the case. 2d Steyning, 2 Fra. 403. The counsel for the petitioners having finished that part of the evidence which related to a particular tithing, submitted to the committee whether the case should not be divided into classes, and that they should now be heard to observe upon this part of the case. This was resisted on the part of the sitting member, who contended that the whole of the accuser's case should be first disclosed; and the committee decided accordingly. P. 407.

Of the cases reported in the first volume of these Reports, the reader is referred to that of Coventry, p. 34, where, at the request of Mr. Jefferys's counsel, the question upon his qualification was argued and decided upon in the first place; to that of Liskeard, where it was agreed, that the decision of the committee

should be first obtained upon the right of election: to that of Kircudbright, p. 442. where, by the agreement of counsel the case was divided into separate questions: and to that of Caermarthenshire, p. 288, 289. where, by similar agreement, the questions, as to the misconduct of the returning officer, as to bribery and treating, and as to the majority of votes, were taken separately.

The cases that have occurred upon the separation of the merits of the election, from the question upon the return, will be mentioned in a note upon the case of *Middlesex*, 1805, *post*.

## CASE XXXIII.

THE BOROUGH OF MIDHURST, IN THE COUNTY  
OF SUSSEX.

The Committee was appointed on the 4th of February, 1804, and consisted of the following Members :

Rt. Hon. Tho. Grenville, <i>Chairman</i> .	Andrew Strahan, Esq.	
Rt. Hon. John Smyth.	Edw. Berkeley Portman, Esq.	
Lord Cha. S. Manners.	Sir Martin Browne Folkes, Bart.	
Earl Temple.	Ambrose St. John, Esq.	
Hon. Wm. Aug. Townshend.	Benjamin Hobhouse, Esq. for the	} <i>Nominees.</i>
Wm. Clive, Esq.	Petitioner,	
John Blackburne, of Lancashire, Esq.	Wm. Dickenson, Esq. jun. for	
Hon. Geo. Watfon.	the sitting Member,	
Rt. Hon. Nath. Bond.		

Petitioner. Thomas Holt White, Esq.

\* Sitting Member. Edmund Turnor, Esq.

Counsel for the Petitioner : Mr. Serjt. Rannington ; Mr. Clifford.  
for the sitting Member: Mr. Adam ; Mr. Pell.

THERE is no determination by the House of Commons respecting the right of election in this borough : it is exercised by the burgage-tenants. See 16 Journ. 11, 419. Nov. 24, 1708. Dec. 5, 1710.

The petitioner stated in his petition<sup>a</sup>, that Mr. Turnor was not duly qualified to sit in parliament ; that he had been guilty of bribery and treating ; and that the petitioner had the legal majority of votes, and should have been returned ; and he also complained of the misconduct and partiality of the returning officer ; but he declined to

<sup>a</sup> The petition was presented 3d February 1803, and renewed by the petitioning candidate, 23d November 1803. The first petition was in the

name of the unsuccessful candidate, and of certain burgage-holders of the borough. It was renewed in the name of the candidate only.

produce



produce evidence before the committee in support of these allegations. The only question was, whether or not the petition should be voted frivolous and vexatious? and the petitioner, in order to induce the committee not to come to such a resolution, proved the death of a person, who was stated to be a material witness, in March 1803; and further, that the sitting member had been apprized by a notice on the 25th of January 1804, that it was the intention of the petitioner not to oppose his right to the seat. Besides the witness above-mentioned, whose evidence was said to be necessary for the petitioner with respect to the right of voting, another witness was also alleged to have died, by whose death the petitioner had been prevented from proving some particular transactions at the time of the election. It was not however stated of what nature these transactions were. Mr. Clifford, one of the petitioner's counsel, being sworn before the committee, deposed, that in his opinion, the evidence of the former witness was material for his client; but being desired, on cross-examination, to state the nature of the evidence which he would probably have given, he referred himself to the committee, whether or not he was at liberty to mention that which he knew only in consequence of a professional confidence. The counsel for the sitting member immediately abandoned their examination as to this point; observing, however, that although the committee would not, in such circumstances, require an answer to the question, yet they could not be expected to make facts concealed from them, the ground of any proceeding. It was further said, on the part of the petitioner, that his intention not to prosecute his petition with effect, having been so early signified to the sitting member, the latter had in reality no just occasion to put himself to any expence whatever; but it was answered, that this consideration was not proper to be entertained by the committee, since it went only to the amount of the costs, which the committee were not to ascertain, but other persons, to whom this matter was referred by the legislature, and who, in the exercise of their duty, would allow to the sitting member no more costs than such as had

Petition frivolous and vexatious.

Professional confidence.

Notice of abandoning a petition.

Decision of  
report.

been really, and necessarily incurred<sup>b</sup>. The committee were to say, whether they were of opinion that this petition, for the presenting of which no reason had been offered, was frivolous and vexatious. The committee, on the 6th February, determined the sitting member to be duly elected, and the petition to be frivolous and vexatious<sup>c</sup>.

Incidental  
point. Where  
what is said  
by a supposed  
agent may be  
received as  
evidence of  
agency.

The committee suffered Mr. Clifford to give in evidence a conversation with Mr. Forbes, a gentleman alleged to be an agent of the sitting member, with respect to the notice given by the petitioner not to prosecute his petition, before any evidence had been given of the agency of Mr. Forbes. One of the committee gave it as his opinion, that such conversation should be admitted in evidence, where the nature of it went to prove, not only what had actually been done by the person employed, but also, that he had been employed by him for whom he professed to act: subject, however, to further proof of the subsequent adoption of his acts, or of an actual employment on the part of his principal<sup>d</sup>.

<sup>b</sup> See ft. 28 G. 3. c. 52. s. 20. 22.

<sup>c</sup> See vol. 1. p. 470. 472.

<sup>d</sup> See ante, p. 33. and vol. 1. p. 7.

102. 209. 375. 467.

## CASE XXXIV.

### THE BOROUGH OF SOUTHWARK, IN THE COUNTY OF SURRY.

The Committee was appointed on the 8th of February, 1804<sup>a</sup>, and consisted of the following Members :

Wm. Burroughs, Esq. <i>Chairman</i> .	Hon. Galbraith Lowry Cole.	
Cha. Chaplin, Esq.	Josias Dupré Porcher, Esq.	
Rob. Holt Leigh, Esq.	John Baker, Esq.	
Ja. Trail, Esq.	John Palmer, Esq.	
Ja. Buller, of Westlooe, Esq.	D. Parker Coke, Esq. for the Petitioner,	} <i>Nominees.</i>
Ja. Farquhar, Esq.	John Berkeley Burland, Esq. for the sitting Member,	
G. P. Moore, Esq.		
Dudley North, Esq.		
Sir Wm. Paxton, Knt.		

Petitioner. Sir Thomas Turton, Bart.

Sitting Member. Right Hon. George Tierney.

The Petitioner appeared in person before the Committee, and was also assisted by Mr. Wetherell, as his Counsel.

Counsel for the sitting Member : Mr. Serjt. Vaughan ; Mr. Milles.

THE petitioner complained<sup>b</sup>, that the sitting member *Petitioner.*  
 had been guilty of bribery and other illegal practices;  
 "and that divers ministers and other servants under the  
 crown of Great Britain, did use the powers of office in the *Interference*  
 said election, in favour of the sitting member, and in de- *of ministers.*

<sup>a</sup> The day fixed for taking the petition into consideration, was 7th February. On that day, (there not being a sufficient number of members present for the ballot,) the house made an order for adjourning the consideration of it, and also of the Durham election petition, to the morrow : and orders were made, that the names of the members absent at the ballots, and not serving on other election committees, should be reported, and that such as had not a sufficient excuse for their non-attendance, should be taken into the custody of the Serjeant at Arms. It was also ordered that the house should be called over on the morrow. See the Journals of this date, and see ft. 36 G. 3. c. 59.

<sup>b</sup> The petition was presented 1st July ; renewed 23d November 1803.

Improper  
admission,  
&c. of votes.

Refusal of  
returning  
officer to ac-  
cept tenders.

Scrutiny.

Refusal of  
parish-offi-  
cers to pro-  
duce their  
books.

Right of  
election.

Petitioner's  
case.

fiance of the resolution of the house of 10th December 1779; and that many persons not entitled to vote in the said election, were admitted by the returning officer to poll for the sitting member; and that many persons who were entitled to vote, and who tendered their votes for the petitioner, were rejected; and that the petitioner having demanded that the names of all persons who offered to vote for the petitioner, and were rejected, should be inserted in the poll-book, as having tendered for him their votes, the sitting member did strenuously object to the same, and did prevail on the returning officer to refuse to comply with the said demand; and that by means of such refusal, many persons duly entitled to vote at such election, and who came with intent to vote for the petitioner, were prevented from making a regular and formal tender of their votes; and that a scrutiny having been demanded by the petitioner, and granted, the votes of many persons who were entitled to vote, and who had voted for the petitioner, were struck off the poll, and that the votes of many persons who were not entitled to poll, and who had voted for the sitting member, were confirmed; and that divers church-wardens, overseers of the poor, and other persons, having the possession of the parish books of the several parishes in the said borough, did, during the poll and scrutiny, constantly refuse to the petitioner, his counsel, and agents, the inspection of the said books; and did frequently, during the said scrutiny, by the procurement and under the sanction of the sitting member, refuse to produce the said books in evidence, although repeatedly requested by the high bailiff so to do; by which means the said scrutiny was rendered ineffectual to the petitioner."

The right of election in this borough was determined 10th November 1702, to be "only in the inhabitants paying scot and lot." See 14 Journ. 25<sup>c</sup>.

The petitioner, having made a general opening of his case, proceeded, in the first place, to establish his right to the

\* The counsel for the petitioner insisted, "that none, of common right, ought to vote, but such as were liable to pay wages to their members; and

those were only such as paid scot and lot." The opposite party contended for a right in all the householders, not receiving alms.

seat

feat, by endeavouring to shew a majority of votes in his favor. The majority against him upon the original poll, had been 81; and a scrutiny having been demanded by him, and granted by the returning officer (the high bailiff), that majority was further increased to 96. He proposed to prove that the legal majority was in his favor, by adding to his own poll, 1. the votes of between 80 and 90 persons who had (as he stated) tendered their votes for him, and had been rejected upon the ground of their poor-rates being paid by their landlords, and not by themselves; their names however, appearing on the rates: 2. the votes of several, whose rates were paid for them by their landlords, and whose names were not inserted in the rates: 3. the votes of others who were rated by name, but who had not in fact paid the rate, the word "excused" being marked opposite to their names, in the books of rates: 4. he proposed to add several other votes to his own poll, which had been disallowed by the returning officer for various reasons; and to strike off several from the poll of the sitting member, who were not, as he contended, legal voters.

Farmed  
votes.

Miscellaneous  
objec-  
tions.

The first point upon which he produced any evidence, was the tender of those persons who constituted the two first classes above mentioned, and whose votes had been rejected, upon the ground of their rates being paid by their landlords. The particular circumstances that appeared with respect to this part of the case, gave rise to a question as to the sufficiency of the tender. The following are the principal facts proved. It must be observed, however, that in some particulars, a difference of opinion subsisted among the witnesses, as might be expected, in a scene of great confusion, and in a very warmly contested election.

Evidence of  
tender.

The election lasted nine days (7—16 June, 1803.) On the first days of the poll, persons, whose rates had been paid by their landlords, were rejected by the poll-clerk, with the concurrence of the inspectors on each side. A determination of the returning officer had taken place on the first day of the election respecting one of them, which will be mentioned hereafter. On Saturday, the fifth day of the poll; the petitioner manifested an intention to poll the *farmed*

voters,

## ELECTION CASES.

voters, (as such persons were commonly called), and about fifteen of them presented themselves at the booth allotted to the parish of St. George. The poll-clerk took down their names upon the poll, and having made a mark against them, according to directions he had received from the returning officer, sent them round to the returning officer's booth, without making any further entry on the poll. Some altercation took place in consequence of this, between him and the inspector for the petitioner, who desired that their votes might be taken. On the Monday following, the inspector for the petitioner (Mr. Speck) still insisting upon the poll-clerk receiving the votes of the same description of persons, and demanding a formal entry of the tender of their votes to be made on the poll, the poll-clerk went to the returning officer for further directions. The petitioner was there at that time. After a warm discussion, the poll-clerk returned with a paper, containing the following direction from the high bailiff, written by the petitioner himself.

"When a voter comes up to poll, he is to be asked his name and place of abode, and then, whether his landlord pays his poor rates: if he answers in the affirmative, he is to be sent to the hustings: the poll-clerk is not to take his name down."

After this, the poll-clerk, as soon as he had heard that the persons presenting themselves were farmed voters, sent them round to the hustings immediately, without inquiring their names, or, for whom they came to vote.

Mr. Speck deposed, that on the Saturday, in consequence of the refusal of the poll-clerk to receive the votes, or the tenders, of the farmed voters, he asked several of them for whom they would have voted, and that several of them named the petitioner: that he took down some of their names, but was unable to keep an accurate account, owing to the confusion which prevailed at the booth: and in fact, no tender of any particular voter, on the Saturday, was proved. He said further, that on Monday, he still continued to insist upon a tender being made of the farmed voters, at the booth, to the poll-clerk, even after the contents of the abovementioned paper had been made known; that

he

he asked them their names, and for whom they came to vote, and took down their names, and votes, in a book. In general, voters of every other description took the bribery oath, and the oath of qualification : but the poll-clerk would not administer any oath to the farmed voters.

It was further proved, that at the high bailiff's booth, the voter who had been sent round there was asked his name and residence, which was entered in a book. That then he was asked, whether his landlord paid his rates ; and as soon as it was known that he was a farmed voter, he was rejected : and that no one was asked by the high bailiff for whom he meant to vote : but that several of them declared, of their own accord, that they came to vote for Sir F. Turton. Some of the witnesses said, that the high bailiff refused to ask of any such voter, for whom he meant to vote.

It further appeared, that on the first day of the election, a farmed voter having tendered his vote for the sitting member at the booth belonging to the parish of St. John, was objected to as such by Mr. Speck himself, who then attended at the booth on behalf of the petitioner : and that the voter being sent round to the hustings, it was agreed on all hands, and determined by the high bailiff, that he had no right to vote ; and that no further argument took place at the hustings until the Saturday, respecting their right : the only thing required, being, to ascertain the fact of their rates being paid for them. On the part of the petitioner, it was represented, that the vote being objected to and struck off in the parish of St. John, was in consequence of an agreement between the inspectors on each side, relating merely to two farmed voters in that parish, one of whom was understood to be in the interest of the petitioner, the other in that of the sitting member. In the election in 1802, the farmed votes were polled for some time, the letter F. being marked against their names : at length, their right to vote being argued before the counsel for the high bailiff, he decided against them, and ordered the votes of such as had already been received, to be struck off. It was sworn by some of the witnesses, that in former elections they had never been permitted to vote.

A very

A very long examination of several witnesses took place on the subject of the paper, written by the petitioner; the counsel for the sitting member endeavouring to shew, that what was contained therein was the original proposal of the petitioner himself; while it was endeavoured, on the part of the petitioner, to shew that it was only a memorandum which he made of the determination of the high bailiff. The reader will find, from the determination of the committee upon this part of the case, that they adopted the conclusion contended for by the sitting member, at least so far as to consider the petitioner a party to the direction contained in the paper, and to be bound by the terms of it.

The first question arose upon the vote of Thomas Jackson, who was proved to have presented himself to the poll-clerk on Monday (after the delivery of the paper), and to have demanded to vote for Sir T. Turton. The poll-clerk, having understood from him, that his landlord paid his rates, refused to take his vote; and told him to go round to the hustings. Mr. Speck, who stood close to the poll-clerk, having asked him for whom he meant to vote, he answered, for Sir T. Turton. It was proved that Jackson had lived in his house in St. George's parish upwards of six years, and the following entry was read from the rate of Jan. 1803. "King-street. Thomas Jackson. £. 5."—"2s. 6d."

On the part of the petitioner, it was insisted that this was a sufficient tender of Jackson's vote, for the following reasons:

Argument,  
that the tender  
is sufficient: in  
what cases it  
need not appear  
on the poll.

Where a voter goes up to the hustings at an election, and tells the poll-clerk that he comes to vote for a particular candidate; that he is ready to take the oaths, if required; and to answer whatever questions the poll-clerk may put to him respecting his right to vote; if the poll-clerk will not take down his name, the candidate, for whom he tenders, has a right to employ an agent of his own, to take down the name, &c. of such voter, and he may avail himself, on a future occasion, of this tender<sup>d</sup>. The tender to the poll-

<sup>d</sup> See the case of Harwich, *ante*, of this case.  
vol. 1. p. 394. and note (A) at the end

clerk,



clerk, is the only tender which can legally be made; and if the voter has done all that was in his power towards a complete tender of his vote to the poll-clerk, the committee, if he had a good title to vote, will add him to the poll. It is clear, in this case, that, independently of the direction written by the petitioner, the voter had done every thing necessary to a legal tender of his vote for the petitioner. He had presented himself to the poll-clerk; declared his name, and for whom he meant to vote; and was ready to take any oath that might be required of him, or to answer any questions which might be put to him. If, in such circumstances, the poll-clerk refused to receive his name, and his vote, the clear law is, that proof may be received *aliunde*, of the fact of his voting. It is doubtless necessary, that the voter should go further than the mere declaration of giving his vote; as was decided in the case of Gloucestershire, p. 30<sup>e</sup>. He must name a particular candidate, and make his declaration to the legal officer: who, in strictness, was the poll-clerk, and not the high bailiff, to whom he was sent round. The poll-clerk is the person authorised by stat. 25 G. 3. c. 84. s. 7. to take the poll, and is bound by an oath to the legal discharge of his duty. The Gloucestershire committee determined, that a voter, declaring in the booth his intention to vote for a particular candidate, *but not to the poll-clerk*, was not a good tender. p. 32, 33, 34.

The tender  
should be to  
the poll-  
clerk.

It is next to be considered, in what manner the paper written by the petitioner, can operate, to alter the effect of this tender, and render it of no avail? It is admitted, that in a case where there is no petition of electors, a formal agreement between two candidates that certain persons should not poll, might operate, as between those candidates, to prevent either of them from availing themselves of the tender of such persons, or proving their right to vote before a committee: but here, the paper was no more than a reduction into writing by the candidate, of what he understood

Effect of the  
written di-  
rection.

<sup>e</sup> It was determined, "that it is necessary for a person claiming a right to vote, to prove having tendered his vote for a particular candidate, before evidence be allowed to establish such vote."

to be the opinion of the high bailiff; to which he was bound to submit, but which did not preclude him from insisting upon the tender actually made before the poll-clerk. It cannot be considered as a compact that the farmed votes should not be polled: the whole conduct of the petitioner and of his agents clearly shews that no such compact was thought of: and what passed respecting the votes in the parish of St. John cannot be extended beyond that parish, so as to affect the whole of the poll. At most, it amounted to nothing farther than a general understanding, founded upon the proceedings of former elections, and that understanding could not be said to exist on the fifth day of the poll, when such strong exertions were made on the part of the petitioner to get the farmed votes on the poll. Upon their being sent round to the hustings, it was the duty of the high bailiff himself, under whose authority the poll-clerk had refused to take down the name and vote of this person, to have taken down both his name and his vote: the agreement, or decision, acquiesced in and committed to writing by the petitioner, must have been, impliedly, upon the terms of the tender being made to the high bailiff: otherwise, no possible advantage could be obtained or expected from it by the petitioner, whose avowed object it was to avail himself, in the fullest manner, of the benefit of the farmed votes. That advantage having been denied him, in fraud of the original decision, and of the true sense of it, it becomes competent to him to recur to the tender before the poll-clerk, which, at most, he only can be said to have abandoned upon the condition of the tender being made, and accepted, elsewhere. Upon the whole it is submitted, 1. that a legal tender has been proved: 2. that the regulation contained in the written paper, however it might relate to the receiving of votes by the poll-clerk, cannot in point of law be said to prevent the effect of a tender made to him, he being by law the person to whom such a tender should have been made: 3. that even, if such should be held to be the effect of it, still, it was acquiesced in upon the implied condition of the tender being completed before the high bailiff, and that condition not having been effectually fulfilled, the agreement

ment itself should not be enforced to the prejudice of the petitioner.

The counsel for the sitting member argued in the following manner:

The committee are called upon to decide, first, whether Jackson's vote can be considered as having been sufficiently tendered? Secondly, supposing the tender to be sufficient, when considered without relation to the petitioner's conduct, whether, there being no petition from the electors, the petitioner has not, by his own conduct, precluded himself from the advantage he might otherwise have derived from that tender?

Argument, that the tender is insufficient.

First, it is submitted, that the argument of the petitioner is drawn from a false principle, so far as it is founded upon an opinion, that the tender of a vote before the returning officer is less legal, or less effectual, than a tender before the poll-clerk. The poll-clerk is the servant of the returning officer, and assists him in the discharge of his duty: but the act of the poll-clerk is the act of his superior, and if he should refuse a vote, an action would not lie against him, but against the returning officer, who is the only responsible person. It is necessary that he should be, constructively at least, present during the whole of the election. It is by his judgment that each vote is received or rejected. The Stat. 25 G. 3. c. 84. had not for its object, to discharge him from any part of his duty; still less, to create another independent and substantive office: but only, to permit some part of his duty to be executed by a deputy, which the multitude of electors, and the space of time limited for the election, rendered it inconvenient, or impossible, for him to execute in person. The deputy, thus constituted, is bound by an oath faithfully to discharge the functions allotted to him: but it is a great misapprehension of the statute, to suppose, that the original functions of the returning officer have been superseded by it, or transferred to the poll-clerk. The Gloucestershire committee decided, that a declaration made in the booth (i. e. not to any particular person, or to a stranger), and not to the poll-clerk, was not a good tender: but had the tender been made to the sheriff in person, in-

Poll-clerk is only the deputy of the returning officer.

Tender to the principal good.

stead

stead of the poll-clerk, it is not probable that they would have held it to be bad.

The returning officer may direct the tender to be made to him.

If it be admitted, that the returning officer, and he only, has the power of deciding upon a disputed vote referred to him from the place of polling, it can hardly be denied that he has the power of directing that voters of a particular description should be sent round to him in the first instance, and of reserving to himself the taking the poll, as far as relates to them. He may exclude them altogether from the province of the poll-clerk, and may direct them to tender their votes to him in person. If this arrangement is sufficiently notified to the voter, it is his duty to present himself to the returning officer, and make his tender to him. The poll-clerk as to such a voter, is a mere stranger, as soon as he has been informed, that the returning officer has resolved to act for himself, and not by deputy, in his particular instance. Such has been the mode of proceeding in the present case. Assuming, for the present, that the written paper containing the direction to the poll-clerk, was the act of the high bailiff only, to which the petitioner was no party, it is a declaration on the part of the presiding officer, that he will act for himself in receiving or rejecting the votes of that particular class of persons known by the name of farmed voters. It has been sufficiently proved, that this resolution was in all cases made known to the voters; and particularly in the present instance, when the voter actually went round to the high bailiff's booth, in consequence of that resolution being intimated to him. The refusal of the poll-clerk to take down his name, and his direction to him to go round to the high bailiff in the first instance, amounted to a legal and complete notice given to him, that it was to the returning officer, and not to the poll-clerk, that he was to address himself. Then, his duty was to follow the directions that he had received, and to present himself to the high bailiff, and make to him a formal tender of his vote for a particular candidate. Not having done so, he has not done every thing in his power towards giving his vote, and consequently, he has not brought himself within the terms of the petitioner's proposition. There is no pretence, in any view of the

the case, to say that the committee should attend to any thing that passed at the poll-clerk's booth, between the voter, and the agent of the petitioner. Polls taken before other persons besides the returning officer, have always been received in evidence with extreme caution, and in very particular cases only. In the case of Cricklade, 1 *Ld. Gl.* 313. there was strong evidence of the poll being unduly closed by the returning officer, under the pretence of a riot: yet the committee refused to receive a poll taken in his absence, by a stranger. Here, it is not even proved that the vote had been rejected. On the contrary, it had only been intimated to the voter, that he must present himself to the high bailiff. It should therefore have been further proved, that he openly declared in the presence of the high bailiff, for whom he meant to vote: and if, in such circumstances, his declaration had been noted down by any person present, it is admitted that the committee might receive evidence thereof.

Polls taken  
by strangers.

Secondly, considering this question with reference to the conduct of the petitioner himself, it is submitted, that he has precluded himself from taking advantage of what passed before the poll-clerk. It is to be recollected, that this is not the petition of an elector, who complains of an infringement of his rights; if it were so, the acts of a candidate could not be set up as an answer to that complaint: but it is the petition of a candidate; and it is equally unjust, that a candidate should be permitted to set up the rights of an elector, in order to annul his own act. In questions that have arisen between candidates, the House of Commons has always held them bound by their own agreements, however such agreements might, in another point of view, be considered void, as interfering with the privileges of others. Evidence has been given in the present case, to shew, that the farmed voters were rejected at the preceding election: that at the election in question, the first objection against a farmed voter came from the same agent for the petitioner, who is proved to have been so active afterwards in requiring the admission of the rest: and lastly, that the direction given to the poll-clerk on the Monday, was written by the petitioner himself, with a view, probably, to his own advantage. The petitioner

The effect  
of the written  
paper.

Candidates  
bound by  
their own  
acts.

tioner applies to the committee to receive secondary and imperfect evidence of the tender of a vote: the foundation of such an application is, that the returning officer, or his agents, have by their misconduct deprived him of the primary and legal evidence, namely, the entries recorded on the poll: but that foundation fails, where it appears, that their supposed misconduct arose from the act of the very person who makes the application.

Determina-  
tion of the  
committee.

The chairman on the next day (17th Feb.) declared the determination of the committee to be, "that the petitioner, by his own conduct, had precluded himself from the advantage of any tender to the poll-clerks of farmed votes, made posterior to the delivery of the paper<sup>f</sup>."

Case of a  
voter who  
tendered in  
the presence  
of the re-  
turning offi-  
cer.

The petitioner, having failed in an attempt to prove a tender by Jackson of his vote to the high bailiff, called a person of the name of William Vince, who deposed, that having offered his vote to the poll-clerk, and having been sent round by him to the bailiff's booth, he found there both the high bailiff and the deputy bailiff: that having declared his name, and that his landlord paid his rates, he was desired to withdraw: after which, and before he went away, some person whom he did not know, standing near the high bailiff, asked him for whom he would have voted: that he said, for Sir T. Turton; and that he was sure that both the high bailiff and his deputy must have heard him<sup>g</sup>. It had before been proved, that the returning officer had refused to ask any of these voters for whom they would have voted; and that in one instance, he checked an agent of the petitioner for asking that question. It was admitted, that this evidence entitled the petitioner to consider Vince's vote as legally tendered; and that he might proceed to give evidence of the

<sup>f</sup> Had the committee considered the tender of Jackson to the poll-clerk to have been sufficient, the petitioner would have been entitled to offer evidence of the right of 150 persons, who had made their tenders in similar circumstances. The reader perceives, that the determination of the committee upon this point, proceeded upon the

second ground taken by the sitting member's counsel: the direction contained in the paper mentioned *ante*, p. 152. being considered to be the petitioner's own act.

<sup>g</sup> No objection was made, upon this occasion, to the testimony of the voter himself. But see *ante*, p. 134. Vol. I. p. 75.

voter's right. His case was this: he had occupied for five years a small house in the parish of St. George, at the rent of 2s. 8d. by the week, of a person of the name of Falknor, who, having several other small tenements in the same parish, made a composition with the parish-officers for the payment of a certain sum of money in lieu of the poor's-rates of all of them (whether occupied or not), and charged his tenants with an increased rent, in consequence of that payment. The following entry was shewn in the rates of January, and April, 1803, for the parish of St. George. "West division. Queen's court. William Vince. Rental, £5. Assessed, 2s. 6d." But Vince had never paid the rate. The parish-officers had twice summoned him before the magistrates, for the purpose of enforcing the payment of the rate from him; but in each case the proceeding was put an end to by the landlord, who satisfied the parish. The collection of the poor's rates in the borough of Southwark is regulated by a particular statute. It appeared to be a frequent practice in the parish, (many houses therein being occupied by persons in low circumstances, taken by the week, and often changing their inhabitants) for the landlord to agree with the overseers for the payment of an annual sum, somewhat below the proper amount of the poor's rate, but to be paid whether the house were occupied or not. The composition paid was usually the amount of the rate upon two-thirds of the estimated rent of the premises, after deducting the taxes, and other outgoings. Sometimes, where the tenants were very poor, the composition was paid upon only one-third of the rent. In the rate the full rental, and the rate payable upon it, were inserted. but in many instances, a memorandum was made, by means of a private mark, or otherwise, on the opposite page, of the rate being farmed. It is easily seen that this abatement was compensated to the parish by the continual payment of the stipulated sum, and by the responsibility of the person with whom the contract was made. It happened in some instances, that the name of the landlord only, in others, that of the tenant, was inserted in the rates sometimes, the name of the landlord was inserted, and afterwards the names

Voter rated; but the rate compounded for by the landlord.

Case of Wm. Vince.

Farming the rates.

of the tenants, in order to distinguish the premises: and in some cases, where the landlord had failed in his payments, his name was erased, and the name of the tenant was substituted in its place, in order to afford the parish-officers an opportunity of taking their legal remedies against the tenant; and instances were shewn, where the tenants had actually been applied to for payment, on the default of their landlords, and where magistrates had granted warrants of distress against them. The landlords, who had made their agreements with the parish-officers in the manner above-mentioned, were said to have *farmed* the rates of their houses: and hence, the votes of the tenants were commonly called, at elections, *farmed votes*.

Argument  
against the  
vote.

The counsel for the sitting member, who objected to the title of the voter, after observing, that the payment of scot and lot was universally understood, with respect to rights of election, to signify the contribution to the poor's rate, contended, that in the present case, Vince had no right to vote, 1. because the money paid was not in fact a poor's rate: 2. because, supposing it to be a poor's rate, it was not actually paid by the voter himself.

3. The money paid is  
not for a  
poor's rate

First, This is a mere personal contract between the parish officers, and the landlord, that the latter shall pay a certain sum of money annually, not as a poor's rate, but in lieu of it. A poor's rate is only payable in respect of premises that are in the occupation of some person; but this sum is payable, whether the premises are occupied or not. Should the landlord refuse to pay, no remedy by distress could be had against him; since the sum cannot be said to fall within the description of any sums to be raised according to the provisions of the stat. 43 Eliz. c. 2.; for the levying of "which said sums of money," the remedy by distress is given. For such sums are to be raised by taxation of certain classes of persons mentioned in the act, among which, the landlords of premises occupied by others, are unnoticed: and the mode of raising money is not so properly a taxation, as a contract, in lieu of the taxation; and for which the exemption from taxation, in favour, not of himself, but of his tenant, may be said to be a sufficient consideration,



consideration. The only remedy therefore which the parish-officers could have against the landlord in case of his failing to pay the stipulated sum, would be an action upon the contract. It is very questionable, whether the tenant in such circumstances is liable to be distrained upon for the rate, where his landlord has made default; for there is a privity between the tenant and the parish, in consequence of the agreement made between the latter, and his landlord; since the parish have agreed to accept a certain sum in lieu of the rate payable by the tenant, for which the remedy by distress is given; and since by reason of the landlord taking upon himself the discharge of the rates by consent of the parish, the tenant is obliged to pay a higher rent to his landlord. The court of King's Bench in such a case would not issue a mandamus to a magistrate to grant a warrant of distress against a tenant.

Secondly, in this case, supposing the sum paid to the parish to be entitled to the name of a rate, it is not paid by the voter. It is necessary that the payment should be actually made, and *eo nomine*, by the person claiming to vote. That cannot be said to take place, where the landlord of the voter pays the rate, the voter paying to him an advanced rent in consequence. Such a person cannot be said, in the language of stat. 26 G. 3. c. 100. to be an inhabitant, bearing the burthens of the borough: he has discharged himself from those burthens, by a contract of a peculiar nature; and has therefore voluntarily renounced the rights annexed to them by the law. The acquisition of the right of parochial settlements, which formerly was annexed to similar burthens, stood upon the same footing. An actual payment was held to be necessary. This consideration renders it immaterial to this case, that the name of the voter stood on the rate, since the essential qualification, *viz.* the actual discharge of the duty, is wanting. The insertion of the name of the tenant in the rate, might be convenient for the parish officers, and might enable them to identify more distinctly the premises to be discharged from the rate in consequence of the agreement made with the landlord: but all the facts proved before the committee shew, that it was not the tenant, but

a. Not paid  
by the voter.

He must pay  
the whole  
rate.

the landlord whom they considered to be their debtor. Lastly, admitting the sum paid to be for the poor's rate, and to be virtually paid by the tenant; still he would not be qualified to vote, since he has not paid the whole rate, but only a part of it. It is necessary that the voter should bear his full share of the parish burthens; because no line can be drawn, as to how much of the rate must be paid, to entitle a man to vote: if it is considered sufficient for him to pay two-thirds of the rate, it must be considered also sufficient, if he pays only a fiftieth or hundredth part; for the quantity can make no difference, if the principle be once admitted, that the payment of the whole rate is not necessary.

Argument  
in support of  
the vote.

1. The money paid is  
a rate.

The petitioner, in his answer to these arguments, contended, that the tenant, whose name appeared on the rate, was in law liable to the payment of the sum assessed, and that the parish had a right to distrain upon him for what was due, if his landlord should fail in the performance of his contract. As long as that contract is performed, there may be great convenience in pursuing such a course; it may be competent to a parish officer, in the exercise of his discretion, to agree to accept a smaller sum, regularly paid, and well secured, rather than to demand the full amount of his rate from a weekly lodger, whose continuance in the parish, and ability to pay, are uncertain. But it does not from thence follow, that, if default should be made in the sum stipulated for, the remedies which the law affords for the relief of the poor would not be operative. No authority has been cited to shew that the sum actually assessed upon the tenant might not, in these circumstances, be levied by distress; since it appears in the book of rates, as a rate, imposed upon the real occupier of the premises. The circumstance of a less sum being accepted than the full amount of it, might be a matter of complaint upon an appeal, but does not affect the remedy by distress: and it is difficult to imagine how the agreement between the landlord and the parish, after it had been broken on the part of the former, could be set up against the right of the latter to distrain. Neither is it material, that the sum stipulated is payable by the landlord, whether the premises be occupied or not; since in the present

lent case the tenement for which the vote was given was indisputably in the occupation of the voter, and of no other person.

With respect to the other ground of argument taken on the part of the sitting member, it is submitted that here was a sufficient payment made by the voter. The law of parliament is not so strict in this respect, as the law of parochial settlements is, the latter case being governed by the express words of the st. W. 3. which require that a man shall be both rated, and pay the rate, in order to gain a settlement. The law of parliament is comprised in the general and comprehensive term of paying scot and lot, a term, which is now universally understood to mean, bearing the burthens of the parish. It has never been decided that an actual and personal payment is necessary, to satisfy the law: it has been held indeed, that persons excused on account of poverty, or refusing to pay the rates on demand, are disqualified; but such cases differ widely from the present, where the rate, although paid over to the parish by the hands of the landlord, is in reality first advanced by the tenant to him, in the form of an increased rent. Upon the voter therefore, the burthen in this case, actually falls; it is borne by him, and therefore it is but reasonable that the franchise annexed to that burthen should also belong to him. No authority has been cited to shew that a *bonâ fide* inhabitant, rated and paying to the rate, has been held disqualified, upon the ground of his not having paid the full amount of the sum assessed upon him.

It was determined by the committee "that William Vince was not entitled to vote at the last election for the borough of Southwark<sup>b</sup>."

<sup>a</sup> See the case of Bridgewater, ante, vol. 1. p. 103. Colchester, 1789, ante, vol. 1. p. 507. In the case of Abingdon, where the right is in inhabitants paying scot and lot, the House negatived a resolution, (16 Journ. 65. 20th January 1788), that the rector of St. Helen's, in Abingdon, being of sufficient ability to pay parish taxes, but excused on account of his function, had a right to vote. In the case of

Hoditon, 16 Journ. 505, 19th Feb. 1780, evidence was given, to disqualify a voter, that his taxes were paid by his landlord; but no determination of the House upon this point, appears. By st. 11 G. 1. c. 18. s. 19. persons are excluded from voting in London, who have, within two years before the election, been excused the payment of rates at their own request.

Case of the persons whose names were not inserted in the rate.

The committee had desired that the case of the persons whose rates were farmed, and who were not named in the rates, should be discussed in the same argument. The counsel for the sitting member insisted that this was an additional ground of objection to the voters who stood in these circumstances: the petitioner contended, that they were equally liable to pay the rate, as if they were named in the rate, and that the omission of their names made no difference. These votes were disposed of by the decision of the committee that Vince's vote was bad.

S. M. declared duly elected.

Upon the foregoing resolution of the committee being intimated to the petitioner, he declined producing any more evidence in support of his case, and the sitting member, on the 22d February, was declared duly elected.

Incidental points.

It may be proper to state shortly the evidence given to support the last charge in the petition, viz. the refusal of the parish-officers to produce, at the poll and scrutiny, the books of the poor's-rates, for the inspection of the petitioner. It appeared that the parish-officers of St. George's parish, to which the question principally related, upon the demand from each party of a copy of the rates of January and April preceeding the election, had delivered to them copies taken from the rate itself, without any memorandums, or private marks, by which it could be distinguished, who were excused from the payment of their rates, either on account of poverty, or of any agreement between their landlords and the parish; that they constantly refused to the petitioner and his agents, both at the poll and scrutiny, the inspection of the rates; shewing only the entry in the rate respecting the particular voter in question, and not suffering them even to see whether there were any private memorandum or mark set against his name in the opposite page, nor to pursue their inquiries further in the book, as they repeatedly requested permission to do. The assessor (Mr. Serjt. Runnington) said, that at the scrutiny, there was, at first, some hesitation on the part of the parish-officers to produce the rates; and that he threatened them with a criminal information, and a report to the House of Commons if they refused to produce them; that then they were produced,

produced, and were made use of throughout the whole of the scrutiny; and that he (the witness) had the full use of them. The petitioner had made the want of a fair inspection of the poor's-rates, the principal ground of his demand of a scrutiny. It was not denied, that the sitting member had opportunities of a free access to them. The evidence of the conduct of the parish-officers in this respect, led to no determination of the committee<sup>1</sup>.

Mr. Speck (whom the petitioner intended to examine as a witness) having been named by him as an agent, was, according to the usual practice, allowed to remain in the room during the trial. The evidence relating in a great degree to Mr. S.'s conduct at the election, it was suggested on the part of the sitting member, that he should not be suffered to remain in the room during that part of the case, but the committee were of opinion, that the privilege having been once allowed him, could not be retracted, if he desired to remain in the room. Mr. Speck, however, voluntarily retired. Mr. Swan, a barrister, being called as a witness, Rule for the exclusion of witnesses: agents: was objected to, as having been in the room. Barristers; It appeared however, that it had been agreed, at the commencement of the trial, that he should be at liberty to remain; but the chairman said, that he had always understood that this privilege had been allowed to all gentlemen of the bar.

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#### NOTE (A) from p. 154.

The reporter has taken the liberty to subjoin the opinion of an eminent advocate upon a case stated to him some years ago, which contains a very able and elaborate statement of the law, as it relates to the tender of votes at an election.

#### CASE.

The right of election for the borough of Leominster, is in the bailiff, capital burgesses, and inhabitants, paying scot and lot.

<sup>1</sup> See note B. at the end of this case.

The election of members, to serve in parliament for this borough, came on 27th May 1796. John Hunter, Esq. George Augustus Pollen, Esq. and Robert Biddulph, Esq. were the candidates. The borough of Leominster is divided into wards, and the usual way of taking the suffrages of the inhabitants is to call the names, each in rotation, as they stand in the poor's-rate. Previous to the poll being taken at the election, it was mutually agreed between the several candidates and their advocates, that the titles of disputed votes, for either candidate, should be scrutinized after the poll should be taken on the unobjectionable voters. The suffrage of each voter was demanded by the town clerk asking the person polling, after his title was admitted, for whom he voted? Those whose title to vote was disputed, were asked by the town-clerk, "If you are admitted to vote, whom do you vote for?" and each answer was taken down on a loose piece of paper, and not entered in the poll-book. It was agreed by all the candidates, that each voter had a right to alter his suffrage in favor of either, or both of the other candidates, against whom he first gave his voice, till his title was admitted: when each voter was re-examined as to his title to vote. None of those whose titles were rejected by the returning officer, afterwards offered to tender their votes, or to give their voices in favor of either candidate. Those on the scrutiny, whose titles were admitted, were each asked (immediately on such admission) by the town-clerk, "Whom do you vote for?" And each voter's name was immediately taken down in the poll-book by the poll-clerk, and properly marked to the candidate in favour of whom he gave his suffrage.

You are desired to answer the following questions:

Suppose (under the above circumstances) those voters, whose titles were rejected by the returning officer, on the scrutiny at the election, shall be established in a committee of the House of Commons, can their suffrages be taken in favor of those candidates for whom they first gave their voices?

I am clearly of opinion that they may.

A person tendered himself to vote, who was objected to on the part of Mr. Pollen, and the objection succeeded. He was never asked, nor did he say for which of the candidates he meant to poll: Should a committee of the House of Commons be of opinion his vote was a good one, can his vote be added to the  
poll

poll in favor of Mr. Biddulph, it not appearing for whom he meant to vote?

The first sensation which the statement that gives rise to this objection naturally excites, is one adverse to the objection itself; inasmuch as, according to all probability, it must have been perfectly understood, although not actually expressed at the time, for whom the vote was intended to be given; and the circumstance of the question not being put, probably arose only from the intention of the voter being sufficiently apparent without any question being put to ascertain it. Besides, it is to be observed, that it is not the omission merely of the voter himself; for the case states "he was never asked the question." Now as it is not usual to declare for whom the vote is tendered, until the question is put; it is clear, that in this case the omission originated with the person taking the poll. We shall therefore have to maintain in a case where much may depend upon a single vote\*, that the vote in question cannot be put upon the poll, upon the ground that the want of an express declaration leaves it doubtful for whom the vote was intended: whereas, in point of fact, every member of the committee will be convinced no such doubt exists, and, that if the question had been put, the answer would have been in favour of Mr. Biddulph. It will therefore resolve itself in the estimation of the committee into an objection of form, raised against the truth and justice of the case: an objection less likely to succeed before a committee of the House of Commons than in courts more in the habit of regulating their decisions by the strict rules of the law; and in such a case, it is plain, that the law must be clearly in favour of the objection, to enable it to prevail.

In the way in which the case is stated, I should have little difficulty in giving a short and direct answer, that the vote cannot now be established. The question put to me is, "can the vote now be added to the poll, *it not appearing for whom he meant to vote?*" To this I should answer, certainly not; and upon the ground stated, that it does not appear for whom he meant to vote. But the case so stated begs the question, for it assumes as universally true that it cannot appear for whom a person intends to vote, except by a declaration in words at the time; whereas I conceive the real consideration to be, whether such intention may not be evinced by other evidence, than actual declaration? and if so, whether there is evidence sufficient for the purpose in the present instance?

\* The election was determined by a note of the case, *post*.  
majority of one upon the poll. See a

I am not aware of any statute that directs in what manner votes, when tendered and rejected, shall be disposed of; the different statutes relating only to the actual poll in cases wherein a poll is clearly directed to be taken. Neither do I know of any case in which the present question has arisen, with the exception I shall presently state. Supposing the question therefore to be determined in this respect on general principles, I conceive that cases may exist in which an actual declaration would not be necessary; the nature of such cases need not be specified, because I am clearly of opinion, that the present is not one of the number, and for reasons which I shall immediately give. But admitting such cases exist, they must all stand upon this general ground, *viz.* that there must be, by some means tantamount in point of proof to an actual declaration, a clear manifestation of the will of the person tendering his vote at the time of such tender; in which case, the fact being established, although the medium of proof should differ, the difference would become immaterial. But this can only apply to very particular cases, and does not apply to the present, because I conceive all such cases must be considered as of special exception; the exception arising in this way, namely, that other evidence than actual declaration shall only be received in cases where such declaration could not possibly be made, or in which the omission in making it is not in any degree to be imputed to the voter himself. The general principle applicable to the present point is, that that which ought to have been done, shall in point of law be considered as done. The utmost, therefore, that can be contended for in favour of a rejected vote, is, that at the moment of being rejected, the voter had done all that was necessary to be put upon the poll, which is equivalent to have been actually polled; but in this case the voter has not done all that was necessary, inasmuch as he might have declared, and therefore ought to have declared, for whom he tendered his vote, and as he did not do this, and the omission does not fall within any of the possible grounds of exception, I am clearly of opinion, that the vote cannot now be added to the poll.

I have already alluded to a possible exception to what I have already stated, *viz.* that I know of no case decided similar to the present; and the case to which I alluded was that of *Okehampton*, at the last general election before the present, in which I understand the same objection was raised and over-ruled under the following circumstances, as far as I have been able to collect them. The voters for the different candidates had, during the course of the

the



the election, presented themselves on different sides of the hustings, and approached them through different doors: they wore respectively the colours of the different candidates for whom they meant to vote; and there being no doubt as to the intention of the voters objected to in the mind of any person present, candidate, counsel, or voter, the question was in some instances neglected to be put, and in consequence, an objection, precisely similar to the present, was afterwards raised before the committee. The votes were admitted; but from what I have heard, I conceive the objection was reluctantly made, and being made, not very strenuously maintained; but at all events, had it been maintained to the utmost, and had the committee over-ruled it upon thorough deliberation, I can only say it is my clear opinion, such a decision would have been illegal, and ought not to weigh with any subsequent committee. Of this decision we shall, however, probably hear much: what effect it may produce, it is of course impossible to estimate. I can only state how, in my judgment, it ought to be treated, and this I have already done.

ROBERT DALLAS.

Lincoln's Inn, June 21, 1796.

NOTE (B) from p. 167.

By ft. 17 G. 2. c. 3. s. 2. the overseers of the poor are directed to permit every inhabitant of the parish to inspect the rate, upon payment of one shilling; and to give him a copy of the same, or any part thereof, upon payment of 6d. for every 24 names. In this case it was said, that the accounts for the parish of St. George not having been at the time of the election made up and audited, it did not appear, from the inspection of the rate itself, who were excused, either totally or partially, the payment of their rates: the memoranda marked on the opposite sides of the pages of the rate, not being considered by the parish-officers to be a necessary part of the rate, were withheld from the persons who demanded inspection on the part of the petitioner. It might perhaps be advisable to permit the candidate to enforce the attendance of one or more overseers, with the poor's-rate, at elections where the right is in inhabitants paying scot and lot; in the same manner as the attendance of the clerk of the peace, with the land-tax assessments, is provided for in counties, by ft. 20 G. 3. c. 17. s. 14.

After

Inspection  
by order of  
the House of  
Commons,  
or their  
Speaker.

After the petition had been presented, the petitioner obtained an order from the Speaker, to be permitted to inspect the poor's rates of the parish of St. George. A similar order for inspection of the books of the corporation of Liskeard was granted to the petitioners appealing against the determination of the committee in 1803. See *ante*, p. 126. The case will be reported in the succeeding part of this volume. The reader, who is desirous to see some instances in which the House of Commons has exercised the power of granting inspections, at the instance of parties to petitions of election, is referred to the following entries in their Journals.

10 Journ. 17. 2d February 1688 Leave was given to Sir John Stonehouse (the petitioner,) or such as he should appoint to have recourse to all the poll books, and other books and papers which are in the hands of the overseers of the poor of the borough of Abingdon; and all other books relating to the election of a burgess to serve in the present convention, for the said borough; and that he have copies of the same, if desired. And that Thomas Medlicott, Esquire, a member of this House, should have the same liberty.

10 Journ. 473. 17th November 1690. It was ordered that the books of the overseers of Cirencester should be left with the clerk of the House, that the same might be inspected by the parties concerned in the said election.

23 Journ. 405. 14th December 1739. It was ordered, that the commissioner, and the clerk of the cheque of the dock-yard at Plymouth, should permit the sitting member to inspect and take minutes of the muster-rolls and books, wherein are contained the time of entry and discharge of all shipwrights, labourers, and other artificers, belonging to the said dock. A similar order was made upon the agent victualler, and clerk of the cheque of the victualling office.

25 Journ. 240. 15th January 1746. "Ordered, that the secretary to the commissioners of the customs do attend this House upon Tuesday morning the 3d day of February next, and bring with him the order for appointment, and the appointment, of Mr. William Bedall, to be one of the surveyors-general, or inspectors-general, of the customs, and the reports made by him the said Mr. W. B. as such; and also that he do, in the mean time, permit Luke Robinson, Esquire, who hath petitioned this House, complaining of an undue election and return of a member" (Samuel Gumley, Esq.) "to serve in this present parliament for the borough of Hedon, or his agents, to inspect the said order, appointment,

appointment, and reports, and take copies thereof if he sees fit."

This authority is now exercised by the Speaker, by virtue of an order of the House for that purpose, made upon reading each petition, and upon the day being fixed for taking the same into consideration. In the first case under the st. 10 G. 3. c. 16 that order was not made till two days after the petition had been presented,

33 Journ. 43. 5th December 1770. "The House was moved, that the petition of Thomas Rumbold \*, of Hill Street, Berkeley Square, in the county of Middlesex, Esquire, which was presented to the House upon Monday last, might be again read;

"And the same being read accordingly,

"Ordered, that Hugh Roberts, the constable and returning officer for the borough of New Shoreham, in the county of Sussex, do attend this House upon Tuesday morning next, with the original poll taken by him at the last election, on the 26th day of November last.

"Ordered, that Mr. Speaker do issue his warrant, or warrants, for such persons, papers, and records, as shall be thought necessary by the several parties, on the hearing of the matter of the said petition of Thomas Rumbold, Esq."

The practice now is, first to enter upon the journals the petition itself, then, the order for it to be taken into consideration on a particular day, and lastly, for the Speaker to issue his warrants, &c. The following is the form of these warrants.

### F O R M S

Of Speaker's warrants for witnesses and papers required at the consideration of election petitions.

#### No. 1.

For attendance of witnesses.

Whereas by an order of the House of Commons, the matter of the petition of \_\_\_\_\_, complaining of an undue election and return for \_\_\_\_\_ is appointed to be taken into consideration by the said House, upon the day of \_\_\_\_\_ at \_\_\_\_\_ of the clock in the afternoon.

These are therefore to require you \_\_\_\_\_ (and each and every of you †) to be and appear at the bar of the House of Commons,

\* See *ante*, vol. 1. Introd. p. 1.

† If two or more.

upon

## ELECTION CASES.

upon the said day of at of the clock in the afternoon, to receive and obey such further order as the said House shall make concerning the said petition :

As you will answer the contrary at your peril.

Given under my hand, this day of , one thousand eight hundred and four,

C. A.

Speaker.

## No. 2.

For the inspection and production of public papers; but not compelling the attendance of any particular person.

Whereas by an order of the House of Commons, the matter of the petition of, &c. &c. (as in No. 1.)

These are therefore to require you , and such other person or persons who have in his, her, or their custody or power (description of the papers, &c. required, as the instructions are given) to permit the said or his agent or agents, to inspect the same, and take such notes and copies thereof as he or they shall think fit :

And that you the said , and the other persons aforesaid, or some one for you, do attend the House of Commons, upon the said day of , at of the clock in the afternoon, with all such (description of papers, *short*) as aforesaid, as the said or his agent or agents shall require to be produced at the hearing of the matter of the said petition :

As you will answer the contrary at your peril.

Given under my hand, this day of , one thousand eight hundred and four,

C. A.

Speaker.

## No. 3.

For the production of any private books or papers as described in the warrant, and compelling the attendance of the person to whom the warrant is directed.

Whereas by an order of the House of Commons, the matter of the petition of &c. (as in No. 1.)

These are therefore to require you and each and every of you to bring in your custody (description of papers, &c. required) and with them to be and appear at the bar of the House of

of Commons, upon the said day of , and to receive and obey such further order as the said House shall make concerning the said petition ;

As you will answer the contrary at your peril.

Given under my hand, this day of , one thousand eight hundred and four.

C. A.

Speaker.

#### No. 4.

When no committee has been chosen by ballot on the day appointed for hearing an election petition, the preamble of Speaker's warrants is in this form.

Whereas by an order of the House of Commons, the matter of the petition of complaining of an undue election and return for the , was appointed to be taken into consideration by the said House, upon the day of at of the clock in the afternoon.

And whereas the said order hath from time to time been duly adjourned to : These are therefore to require you , and each and every of you, *forthwith* to be and appear at the bar of the House of Commons, to receive and obey such further order as the said House shall make concerning the said petition ;

As you will answer the contrary at your peril.

Given under my hand, this day of , one thousand eight hundred and four.

C. A.

Speaker.

The select committee, after its appointment, is empowered to send "for persons, papers, and records," by st. 10 G. 3. c. 16. s. 18.

See the questions upon inspection of court-rolls, &c. which arose in the case of *Middlesex*, *ante* p. 118. *et seq.*

## CASE XXXV.

## THE CITY OF DURHAM.

The Committee was appointed on the 8th of February, 1804, and consisted of the following Members :

Rt. Hon. Tho. Steele, *Chairman*.  
 Tho. Davis Lamb, Esq.  
 Cha. Mills, Esq.  
 Lord Geo. Thynne.  
 Sir Tho. Theo. Mervaise, Bart.  
 Hum: Grey Sibthorpe, Esq.  
 Walter Spencer Stanhope, Esq.  
 Rich. Archdale, Esq.  
 George Anth. Legh Keck, Esq.

John Dent, Esq.  
 Hon. Geo. Cranfield Berkeley.  
 Sir Michael le Fleming, Bart.  
 James Langham, Esq.  
 Jonathan Raine, Esq. for the peti-  
 tioners,  
 Lord Dunlo, for the sitting  
 Member,

}  
 Nominees.

Petitioners.	Electors.
Sitting Member,	Richard Wharton, Esq.
Counsel for the Petitioners,	Mr. Wilson, Mr. Ferguson,
for the Sitting Member,	Mr. Adam, Mr. Hullock.

Petition.

THE petition<sup>a</sup> stated, that at the last election, Ralph John Lambton, Richard Wharton, and Michael Angelo Taylor, Esquires, had been candidates, and that the two former had been returned; that the petitioners had voted for Mr. Taylor; that Mr. Wharton, by himself, and his agents, had been guilty of treating, bribery and corruption; and that his election was void.

Right of  
election.

The right of election is "in the major part of the mayor, aldermen, and freemen of the said city, which shall be

<sup>a</sup> Presented, 7th December 1802; renewed, 23d November 1803.

present at such election." Admitted, 4th May, 1762.  
29 Journ. 327<sup>b</sup>.

The evidence produced in support of the petition was directed to prove, 1. the bribery of non-resident voters in London, before the election: 2. that the resident voters had been treated at Durham after the *teste* of the writ: and 3. that 80 freemen had been carried down from London to Durham at the expence of the sitting member, and maintained by him there; that they had received a sum of money from him as an indemnity for the loss of their time, and a further sum to pay their expences back to London. The defence of the petitioner consisted in endeavouring to disprove the two first of these charges, and to shew with regard to the last of them, that the money and conveyance afforded to the voters, had been no more than were necessary to enable them to exercise their franchise, and had not been given to them for the purpose of influencing their votes; and it was contended, that it was not illegal to provide these accommodations for them. The case being of this complex nature, and the committee having decided generally, that the election was void, no authority can be derived from their decision, with respect to the legality or illegality of the payment of the expences of out-voters by the candidate for whom they vote, especially since the counsel for the petitioners not only insisted that they had proved direct bribery, and the treating of resident voters, but also contended, that the provisions and money distributed to the non-residents, were exorbitant and unnecessary, and were, in fact, the consideration paid to them for their votes. Since, however, the question of law arising from this part of the case produced some new arguments on each side, a

Nature of  
the case.

<sup>b</sup> The right of sending members to parliament was granted to the county palatine and to the city of Durham, by 25 Car. 2. c. 9. which enacts, that "the election of the said burgesses from time to time, to serve in the high court of parliament for the city of Durham, shall be made from time to time by the major part of the mayor, alder-

men, and freemen of the said city of Durham, which from time to time shall be present at such elections."—The creation of a great number of freemen in this city, for the purpose of voting at a particular election, gave rise to the stat. 3 Geo. 3. c. 15. which is now generally called the Durham act.

short report of them will be here presented to the reader, together with a statement of the principal facts proved in evidence, so far as they related to this point. For the general scope of the argument, and for most of the authorities cited, the reader is referred to the case of Herefordshire, *ante*, vol. 1. p. 185., and to that of Berwick upon Tweed, *ante*, vol. 1. p. 401.

Expences of  
non-resident  
voters.

It was proved, that several persons residing in London had received, some time before the election, about 5*l.* each in advance from the agents of the sitting member; that they had been conveyed at his expence to Durham several days before the election began; that in most cases they had been maintained there by him at an allowance of 12*s.* 6*d.* a day, and were allowed 8*s.* a day for their loss of time; and that they had received 7*l.* 13*s.* to pay their expences back to London. It is unnecessary to trouble the reader with a further statement of the evidence given, either in general or in particular instances, to shew, on the one hand, that the allowance was exorbitant and unnecessary, or on the other hand, that it was only a reasonable indemnity to the voter: since the present report is confined to the question, whether or not the *bonâ fide* payment to an out-voter, of his expences, and for the loss of his time, be legal or not? and in that view of the case, it was necessarily admitted on one side, and assumed on the other, that the payment was reasonable and *bonâ fide*, and not corrupt or colorable.

Argument  
for the sit-  
ting mem-  
ber.

It was submitted as a proposition on the part of the sitting member, "that a *bonâ fide* allowance for travelling expences, subsistence, and loss of time, is legal." The object of the stat. 7 Will. 3. c. 4. was to prevent a particular species of corruption, namely, the giving any entertainment by the candidate to the voters after the *teste* of the writ, "in order to be elected." It is necessary that this corrupt purpose should be proved, as a part of the offence; for the criminality of treating consists in bribery. The statutes 2 Geo. 2. c. 24. and 7 Will. 3. c. 4. are equally directed against bribery; and, as all offences against the former statute (by a candidate) must also be offences against the latter, so *à converso*, that which is not a violation of the statute of



George the second, is not a violation of the statute of William. The resolution of the House of Commons, 2d April 1677<sup>e</sup>, declares treating to be bribery; if so, the treating must be corrupt; for otherwise, it could not be called by the name of bribery, which implies corruption. The st. 7 Will. 3. has, manifestly, the same object as the resolution of 1677; and the st. 2 Geo. 2. still pursues the same end. The title of the former statute is, "for preventing charge and expence in elections:" the professed object of the latter is, that all elections may thereafter be made "without charge or expence;" and it recites, "that the laws already in being had been found by experience not to be sufficient to prevent *corrupt* and illegal practices" in elections; manifestly alluding to the resolution in 1677, and the statute of William. It therefore superadds to the forfeiture already inflicted upon the candidate, heavy penalties upon all persons concerned in these corrupt and illegal practices. Nothing can more clearly mark the offence to which the statute of William was meant to apply.

" 2d April 1677. "Resolved, that if any person hereafter to be elected into a place for to sit and serve in the House of Commons for any county, city, town, port, or borough, after the *return*, or the issuing out of the writ or writs of election, upon the calling or summoning of any parliament hereafter; or, after any such place becomes vacant hereafter in the time of parliament, shall, by himself or by any other on his behalf, or at his charge, at any time before the day of his election, give any person or persons having voice in any such election, any meat, or drink, exceeding in the true value ten pounds in the whole, in any place or places, but in his own dwelling-house or habitation, being the usual place of his abode for six months last past; or shall, before such election be made and declared, make any other present, gift, or reward, or any promise, obligation,

or engagement to do the same, either to any such person or persons in particular, or to any such county, city, town, port, or borough in general, or to or for the use and benefit of them, or any of them, every such entertainment, present, gift, reward, promise, obligation, or engagement, is by this House declared to be bribery; and such entertainment, present, gift, reward, promise, obligation, or engagement being duly proved, is, and shall be a sufficient ground, cause, and matter, to make every such election void, as to the person so offending, and to render the person so elected incapable to sit in parliament by such election: and hereof the committee of elections and privileges is appointed to take especial notice and care, and to act and determine matters coming before them accordingly."

The question therefore is, has the sitting member incurred the penalties of the st. 2 Geo. 2. c. 24. s. 7<sup>d</sup>? for if not, neither has he incurred the forfeiture of his seat, inflicted by the st. 7 Will. 3. It will be shewn, that neither committees, nor courts of law, have considered the payment of their expences to voters to be of itself an illegal or corrupt transaction. Such a decision, indeed, would deprive a large proportion of the electors in this kingdom of the exercise of their rights. When the stat. 25 Car. 2. first gave the elective franchise to the freemen of Durham, it must have been well known that many of them lived at a distance from that city; yet the right was not limited to the resident freemen. Such a limitation however will take

“ 2 Geo. 2. cap. 24. “ An act for the more effectual preventing bribery and corruption in the elections of members to serve in parliament.

“ Whereas it is found by experience that the laws already in being have not been sufficient to prevent corrupt and illegal practices in the election of members to serve in parliament; for remedy therefore of so great an evil, and to the end that all elections of members to serve in parliament may hereafter be freely and indifferently made without charge or expence, be it enacted, &c. [s. 1. gives the form of the bribery oath, &c.]

s. 7. “ And be it further enacted by the authority aforesaid, that if any person, who hath, or claimeth to have, or hereafter shall have or claim to have, any right to vote in such election, shall, from and after the said twenty-fourth day of June, which shall be in the year of our Lord 1729, ask, receive, or take, any money, or other reward, by way of gift, loan, or other device, or agree, or contract for, any money, gift, office, employment, or other reward whatever, to give his vote, or to refuse or forbear to give his vote, in any such election, or if any person by

himself, or any person employed by him, doth or shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes, or to forbear to give his or their vote or votes, in any such election, such person so offending in any of the cases aforesaid, shall for every such offence, forfeit the sum of five hundred pounds of lawful money of Great Britain, to be recovered as before directed, together with full costs of suit; and every person offending in any of the cases aforesaid, from and after judgment obtained against him in any such action of debt, bill, plaint, or information, or summary action or prosecution, or being any otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member or members to parliament, and also shall for ever be disabled to hold, exercise, or enjoy, any office or franchise to which he and they then shall, or at any time afterwards may, be entitled, as a member of any city, borough, town corporate, or cinque port, as if such person was naturally dead.”

place,

place, if the construction of the law contended for by the petitioners should prevail. In the case of Radnorshire<sup>a</sup>, the committee allowed the sitting member to retain his seat although a distribution of tickets of the value of 5*s.* each, to each voter, was plainly proved; but the nature of that case was such as to exclude every idea of corruption: an opposition being unexpected till the very moment of the election; neither was there any evidence of the tickets being converted into cash, a circumstance of great weight in the case of Herefordshire<sup>f</sup>, where, also, it was proved, that the voter who gave a vote for one candidate only, received from that candidate two tickets. Hitherto the question has been, whether the allowance has been *bonâ fide*, or whether sufficient evidence has been given, either of extravagance in the amount of it, or of an indiscriminate distribution, or of other circumstances of the like nature, to shew, that under the colour of subsistence and travelling expences, a bribe was given. Such was the case of Ipswich, 1784<sup>g</sup>; and such was the doctrine laid down by Lord Mansfield in his speech upon Lord Mahon's bill<sup>h</sup>. The cases of Worcester, 1775<sup>i</sup>, and Barnstaple<sup>k</sup> in the last session, and, in the courts of common law, the cases of *Smith v. Rose*<sup>l</sup>, and *Ridler v. Moore*<sup>m</sup>, support the same construction. In the case of *Ribbans v. Crickett*<sup>n</sup>, the question arose upon the provisions furnished to the resident voters after the *teste* of the writ, the defendant having paid into court the amount of the sum expended in treating the voters antecedently to the *teste*, and the non-resident voters. The opinion of the court, therefore, with regard to the non-resident voters, was extrajudicial. Several actions at law for bribery have been brought in consequence of the late contest for this city<sup>o</sup>. In all of them, the courts have drawn a distinct line between bribery and money given to the voters for the payment of their expences; such payment

<sup>a</sup> *Ante*, vol. 1. p. 494.

<sup>f</sup> *Ante*, vol. 1. p. 186.

<sup>g</sup> 1 *Lud.* 31.

<sup>h</sup> 1 *Lud.* 67, 68.

<sup>i</sup> 3 *Ld. Gl.* 258.

<sup>k</sup> *Ante*, vol. 1. p. 90.

<sup>l</sup> *Clifford*, 371.

<sup>m</sup> *Ibid.* 103.

<sup>n</sup> 1 *Bos. and Pull.* 264.

<sup>o</sup> See the case of *Heward v. Shipley*, 4 *East's Reports*, 181.

not being held to be within the bribery act. In the case of *Wharton v. Lunn*, at York, Mr. Baron Thomson, who tried the cause, told the jury, that if the money was given as a reasonable compensation for the loss of time and travelling expences, the statute did not apply; but, that they must be convinced it was not the colour for a bribe. In the case of *Smith v. Sleigh*, which was an action brought against a voter for asking 30*l.* to go to Durham, and 30*l.* to return, Lord Ellenborough stated the question to be, whether the sum was sought for as an indemnity for the voter's expences, or as a consideration for his vote: and that, in the former case, the voter was not an offender within the statute.

Argument  
for the peti-  
tioners.

Stats. 2 G. 2.  
and 7 W. 3.  
have dif-  
ferent ob-  
jects.

The counsel for the petitioner argued upon this part of the case as follows.

The whole foundation of the argument for the sitting member is, that the objects of the statutes of Will. 3. and Geo. 2. are the same. It is submitted, on the part of the petitioners, that they are entirely distinct from each other; the statute of William being intended to prevent charge and expence; that of George the second, to prevent bribery and corruption. It is admitted, that the resolution in 1677 was the basis of the statute of William; and from an attentive consideration of the resolution and of the statute taken together, and from a comparison of them with the statute of George the second, it will easily appear, that they do not differ from it less in their terms, than in their spirit and intent. The resolution in 1677 became necessary, in consequence of the increasing ardour with which a seat in the House of Commons was sought, and of the expence to which contending candidates submitted, in order to obtain it. From the time of Queen Elizabeth, as the power of that House increased and was more firmly established, illegal and unconstitutional means of being returned were multiplied. The resolution in 1677 limited the expence of the candidate to 10*l.*, (except what should be provided for the voters in his own house), and declared, that whatever was given beyond that sum, should be considered to be bribery. So the law stood, till the year 1696, when the treating act

was

was passed. The variations in this statute from the resolution in 1677 are very remarkable. The indulgence allowed to the candidate to treat the voters at his own house, or to treat them elsewhere to the extent of 10*l.*, was withdrawn, having been, probably, found to afford the means of evasion. Where an expence of 10*l.* was allowed, it might be difficult to shew how much more than 10*l.* had been expended. The word "bribery," made use of in the resolution, was purposely omitted in the statute, in order that treating and bribery might not be confounded, and that the former might be known to be a substantive offence, independently of any corrupt motive which might, or might not, accompany the commission of it.

In the next place, let the statute of Will. 3. be considered, as compared with the statute of Geo. 2., and there will be found to be the widest distinction between them. The title of the one is, "for preventing charge and expence in elections of members to serve in parliament;" of the other, "for the more effectual preventing bribery and corruption" in elections: in the preamble of the one, the mischiefs complained of, are, "undue elections by excessive and exorbitant expences;" in that of the other, "that the laws already in being have not been sufficient to prevent corrupt and illegal practices:" the statute of William prohibits all sorts of treating whatever, given to the voters after the *teste* of the writ; the statute of George the second, prohibits bribery, at any time before the election, without adverting to the *teste* of the writ. The statute of William inflicts a punishment upon the candidate only, namely, the forfeiture of his seat; that of George the second imposes a pecuniary penalty upon all persons whatever, who disobey it. The construction attempted to be put by the sitting member upon the statute of Will. 3. by considering it as directed only against bribery in particular circumstances, would render it entirely nugatory and absurd. Bribery, at all times, was an offence by the law of parliament, and a cause of the election being avoided: it would therefore have been absurd to enact, such being the law before the act, that bribery committed at a particular time should incur the same con-

sequence. The return of Mr. Foley for Bewdley was avoided for bribery in 1676, and Mr. Herbert, the petitioner, was seated in his stead<sup>p</sup>. If, according to the argument of the petitioners, the two statutes apply to precisely the same offence, and are to be construed together, it follows, that the limitations of the stat. Will. 3. will control the general words of the stat. Geo. 2., and then, a candidate will be at liberty to commit bribery before the *teste* of the writ, without being subject to any of the penal consequences resulting from the latter. It is therefore submitted, that the act of Will. 3. had for its object to prevent any money or provision being given to the voter by the candidate after the *teste* of the writ, without any exception in favour of voters in any particular circumstances; and that the sitting member, having, according to his own admission, provided for the subsistence of a number of voters, and indemnified them by a payment of money for the loss of their time, within the period limited by the statute, has, in consequence thereof, incurred the forfeiture of his seat.

With respect to the authorities cited on the other side, it having been shewn that the stat. 2 Geo. 2. has a distinct object from the stat. 7 Will. 3., upon which the merits of the case, in the present view of it, depend, it is only necessary to observe, that cases decided upon the bribery act, have no relation to the present inquiry. It is not disputed, that in order to recover the penalties under the stat. 2 Geo. 2. it must be shewn, that the bribe was offered, or solicited, for the express consideration of giving, or withholding, the vote; and that, if, in the cases alluded to, the money, &c. appeared to have been given, or sought, for other purposes, as for the conveyance or subsistence of the voter, the actions failed; although indeed, in cases where not only subsistence

<sup>p</sup> 10th March 1676. 9 Journ. 397. Sir Thomas Meres reported, "that the chief matter on which the committee did ground their opinion, was, the bribery of Mr. Foley, to procure the voices of electors," upon which they resolved (and the House agreed in

the resolutions) that Mr. Foley was not duly elected, and that Mr. Herbert (the other candidate) was duly elected; and the return was ordered to be amended. See the case of Chippenham, 1691. 10 Journ. 638. cit. 2 Ld. Gl. p. 414.

has been given, but also an indemnity for loss of time, it should seem that the voter must, in any view of the case, have been overpaid, since, probably, his time would have been employed in working for his subsistence. But in a case like the present, no question arises upon the purpose for which the provision was afforded; since the statute makes no distinction in that respect; and the terms of it are so plain, as not to be rendered more intelligible by any decision or authority. If an exception has been made upon any former occasion in favour of out-voters, this committee will shun a precedent not authorised by law, and will adhere to the terms of the statute: and if the law, as it is at present in force, operates as a grievance upon voters who live at a distance from the place of polling, that grievance should be redressed by those who have the power to alter the laws, and not by those, whose only duty it is to administer them. But the case of Herefordshire is precisely in point to the present question; for there, corruption was not at all proved, or insisted upon, and the election was avoided entirely upon the ground of the voters having been treated. It may also be observed, that if the principle contended for by the sitting member be the true one, namely, that a corrupt intent must be shewn to constitute an offence against the statute of William, there is no distinction any longer between the cases of resident, and of non-resident voters; for entertainments given to resident voters, would also, upon the same principle, be innocent, if they were not given as a consideration for their votes.

The committee, on the 20th of February, determined the election of Mr. Wharton to be void,

Incidental points.

At the close of the opening of the case for the petitioners, the chairman intimated to their counsel, that the committee expected agency to be proved, before any acts of supposed agents were shewn in evidence.

It having been proved that a person of the name of Brand had been employed by the sitting member, at Durham, to pay for the subsistence of the non-resident voters, evidence was offered of some orders which he (Brand) had given re-

Decision of  
the commit-  
tee.

Incidental  
points.

Agency to be  
first proved.

General and  
particular  
agency.

specting

specifying the employment, and payment, of certain resident voters, in the interest of the sitting member, as runners. This evidence was objected to. It was said, that the proof of a particular authority, did not let in evidence of acts not within the scope of that authority; and the case of *Fenn v. Harrison*, 3 Term Rep. 757. was cited<sup>1</sup>. In answer to the objection, the case of *Ridler v. Moore*, Clifford 371. was cited, in which the agency of the committee having been once proved, Lord Kenyon admitted evidence of acts done by individual members of it without the privity of the rest, or of the candidates (the defendants<sup>2</sup>.) In reply, it was observed, that, in that case, a foundation had been laid by shewing a general agency in the committee for all purposes of the election.

The committee desired the petitioners to call further evidence of general agency: upon which they examined a witness who proved, that upon his shewing a bill to the sitting member, which included charges both for the entertainment of non-resident voters, and of such resident voters as had been appointed runners, the sitting member, hearing that it had been incurred by Brand's order, told him that it should be paid. The committee then permitted the petitioners to give evidence of the acts of Brand, as a general agent.

<sup>1</sup> In that case Mr. Justice Buller is reported to have said, "there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent, constituted so for a particular purpose, and under a limited and cir-

cumscribed authority, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another without his consent."

<sup>2</sup> But see the case of *Cirencester*, ante, vol. 1. p. 467. See also *Cricklade cases*, p. 135. *Petrie v. Lord Porchester*.



## CASE XXXVI.

THE BOROUGH OF NEW WINDSOR, IN THE COUNTY  
OF BERKS.

The Committee was appointed on the 9th day of February, 1804, and consisted  
of the following Members:

Hon. Hen. Lascelles, <i>Chairman</i> .	John Willet Willet, Esq.	
Hon. John Scott.	Fra. Burton, Esq.	
James Ferguson, Esq.	Sir Hen. Watkin Dashwood, Bart.	
Hon. Edw. Lascelles.	William Baldwin, Esq.	
John Lubbock, Esq.	Cha. Dundas, Esq. of Berkshire,	} <i>Members</i>
Geo. Porter, Esq.	for the Petitioner,	
John Fane, Esq.	Will. Sturges Bourne, Esq. for	
Hon. Rob. Curzon.	the sitting Members,	
Hon. John Chapple Norton.		

Petitioner. Richard Rambottom, Esq.

Sitting Members. John Williams, Esq. Hon. Rob. Fulk Greville.

Counsel for the Petitioner: Mr. Serjt. Lens; Mr. Conft.

for Mr. Greville: Mr. Milles; Mr. Reader.

for Mr. Williams: Mr. Adam; Mr. Newbolt.

THE petition<sup>a</sup> stated, that the sitting members had been *Petition.*  
guilty of bribery and treating; and that the majority  
of legal votes was in favour of the petitioner, who ought to  
have been returned.

This borough affords a remarkable instance of fluctuating *Right of*  
decisions respecting the right of election, in former times: *election.*  
8th Dec. 1640, it was determined to be in all the inhabitants;  
2 Journ. 47. 6th July 1661, in the mayor, bailiffs, and bur-  
geffes, not exceeding 30; 8 Journ. 292. 5th April 1679,  
in all the inhabitants; 9 Journ. 586. 4th Nov. 1680, in  
those only who pay scot and lot; 9 Journ. 646, 647. 2d

<sup>a</sup> Presented, 6th December 1802; renewed 25th November 1803.

May 1639, in the mayor, bailiffs, and select number of burgesſes, only; *nem. con.* 10 Journ. 118. 17th May 1690, a ſimilar reſolution of the committee was diſagreed to by the Houſe; 10 Journ. 419. 14th April 1715, the right was agreed to be in the inhabitants of the borough, paying ſcot and lot; 18 Journ. 62. 23d March 1737, the reſolution of 4th Nov. 1680 was read as the laſt determination of the Houſe; 23 Journ. 125.

Charge of  
bribery, &c.  
againſt a pe-  
titioner who  
has aban-  
doned his  
claim to the  
ſeat.

In the trial of this petition one queſtion only of conſiderable importance aroſe. The petitioner, in the opening of his caſe, had abandoned his claim to the ſeat, and inſiſted only, that the election of one of the fitting members, Mr. Williams, was void. Nevertheless, the counſel for Mr. Williams at the outſet of his defence, inſiſted upon their right to give evidence of acts of bribery and treating committed by the petitioner; and they relied upon the authority of the caſe of Coventry, *ante*, vol. 1. p. 99. They alſo argued as follows;

Argument  
for the fit-  
ting mem-  
ber.

It is ſubmitted, that it is not only competent to the committee to receive this evidence in the circumſtances of the preſent caſe, but that they are bound to receive it, by their duty. The duty impoſed upon them is, to hear the whole matter of the petition; and by the law of parliament, the fitting member appearing in oppoſition to that petition, has a right to lay before them any matter by way of recrimination againſt his antagoniſt. Not being allowed to petition, he is not confined, in proof, to any previous allegation, as the petitioner is, who cannot give evidence of matters not contained in his petition. In the caſe of Middleſex<sup>b</sup>, a petition of certain electors was offered to the Houſe againſt the pretenſions of Mr. Mainwaring, who had been the unſucceſſful candidate at the election, and had himſelf petitioned againſt the election and return of Sir F. Burdett. The petition was ordered to be withdrawn, for it was ſaid, that the fitting member, without a petition, was at liberty to prove any ground of diſqualification againſt the petitioner. Although the electors do not formally appear as parties

<sup>b</sup> See vol. 1. p. xxi. Introd.

upon this occasion, the committee are bound to take notice of their rights, and to put it out of the power of a candidate, who has already committed offences which disqualify him to sit for a particular borough, to offer himself a second time to represent that borough. The statute 7 Will. 3. c. 4.<sup>e</sup> applies to unsuccessful as well as to successful candidates, and should it appear that the petitioner has offended against that statute, he becomes incapable of serving in parliament for the place in question, upon *such election*; that is, either upon the original election at which the offence has been committed, or at any succeeding election to be holden in consequence of the prior election being declared void. To this purpose the whole proceeding, until the seat is legally filled up, is considered as one election<sup>d</sup>. It was so considered in the case of Kirkcudbright: the petitioner, Mr. Gordon, was declared by a select committee guilty of bribery at the election in 1780<sup>e</sup>, and the election having been declared void, he was returned at the succeeding election: his opponent Mr. Johnston<sup>f</sup>, petitioned against him upon this ground, and, having given notice of his ineligibility to the electors, he was seated by the determination of the committee in 1782. So, where the sitting member had been declared guilty of bribery, and having been an unsuccessful candidate at the next election, petitioned against the return; the committee held that he was ineligible, and would not suffer him to proceed in the proof of what he had alleged<sup>g</sup>. The second case of Southwark 1796<sup>h</sup>, furnishes an instance of the same person being returned upon a second election, whose return upon the first election had been avoided on account of treating. The committee determined him to be

St. 7 Will. 3. c. 4. applies to unsuccessful candidates.

Petitioner declared guilty of bribery, returned at the next election.

Sitting member declared guilty, &c. a petitioner upon the 2d election.

Sitting member declared guilty, &c. returned upon the 2d election.

<sup>c</sup> See vol. 1. p. 186.

<sup>d</sup> See 2 Ld. Gl. 411: and the case of Ilchester, *post*.

<sup>e</sup> See 3 Lud. 466. Mr. Gordon not only claimed the seat, but proved the majority of votes to be in his favour. The committee resolved, "that it is the opinion of this committee that John Gordon, of Kenmore, Esq. was guilty of bribery at the last election for

the Stewartry of Kirkcudbright, and was therefore incapable of being elected." 2d March 1781.

<sup>f</sup> See 3 Ld. 481. 503. 505. 1. Lud. 72. *ante*; vol. 1. p. 500. and see p. 376. note p. In line 9, for sitting member, read; petitioner.

<sup>g</sup> Case of Honiton, 1782. 3 Lud. 165.

<sup>h</sup> Clifford, 343.

ineligible;

ineligible; by which determination, the opinion of the committee in the case of Norwich 1787<sup>i</sup> was over-ruled; and the committee, in the case of Canterbury 1797<sup>k</sup>, having followed the precedent in the case of Southwark, it is now generally understood, that by the common law of parliament, in cases of bribery, and by the stat. of Will. 3. in cases of treating, a candidate proved to have been guilty of either of those offences, is incapable of being returned upon any election holden in consequence of the preceding election having been declared void. From this it appears, that if the petitioner in the present case has been guilty of bribery or treating, those offences render him incapable of being elected hereafter, should the election in question be declared void; and, that if he should be returned, they would afford a just ground for petitioning against him. It should therefore seem more proper, that this committee, to whom the merits of the first election are referred, should pronounce their judgment upon the transactions which took place at that election, than that they should leave them to be investigated, for the first time, by a future committee. It will be said however, that in the cases cited, the resolutions of the committee have been directed either against a sitting member, or against a petitioner who had entitled himself to the seat; and that it has never been determined, before the late case of Coventry, that evidence of bribery, &c. could be admitted against a petitioner, who either had not claimed the seat in his petition, or, who having so claimed it, had afterwards abandoned it. It is not necessary, on the present occasion, to inquire what the law may be, with respect

<sup>i</sup> 3 Lud. 455.

<sup>k</sup> Clifford, 358. In the second Canterbury case, the electors petitioned against Mr. Baker and Mr. Sawbridge, in favour of Mr. Gipps and Sir J. Honeywood. Notice being proved to have been given to the electors, of the ineligibility of the two former, the two latter were seated; and 14 days were given to petition against their return. A petition was presented, but was af-

terwards dropt. Clifford, 364. The committee in that case determined, "that the counsel for the late sitting members be not permitted to bring evidence to disqualify G. G. Esq. and Sir J. H. Bart." p. 361. The ground of this determination might be, that these gentlemen were not, legally speaking, parties before the committee, the petition being from certain electors.

to a petitioner who has only alleged the election of the sitting member to be void, without claiming to himself the right to be returned<sup>1</sup>: but it is submitted, that the petitioner, having in this case claimed the seat by his petition, is not entitled to abandon that claim, so as to withdraw himself from the consequences of it. Since the stat. 28 Geo. 3. c. 52. § 8. no petition can be withdrawn: it was intended, by the provisions of that statute, to prevent petitions being lightly, or vexatiously presented: if they cannot be wholly withdrawn, they cannot be withdrawn partially; and although the petitioner cannot be compelled to offer evidence upon every allegation in his petition, still, he cannot be permitted to expunge those allegations from it. Since he has stated therein, that he is entitled to be returned, as having the majority of legal votes, it is competent to the sitting member to shew that he is disqualified from sitting, by bribery; especially, since the effect of that evidence not only regards the last election, but future elections, which may hereafter take place in consequence of what has been proved at the present trial.

St. 28 G. 3.  
c. 52. No  
part of a pe-  
tition can be  
withdrawn.

The following is the substance of the argument for the petitioner:

Where there is no claim of the seat, or where such a claim having been made, is abandoned, the recrimination on the petitioner by the sitting member, is no object of inquiry for the committee. The stat. 7 Will. 3. provides, that persons guilty of certain offences at an election, shall be incapable to serve upon such election, and that they shall be deemed to be no members of parliament, as if they "had never been returned or elected." It is plain, that this provision applies to those only, who have been returned or elected, or who are entitled, in consequence of having been

Argument  
for the peti-  
tioner.

Committee  
may inquire  
into bribery,  
&c. by sitting  
members;

<sup>1</sup> See Clifford, 117. A witness was asked in cross-examination, concerning a tavern opened for the reception of the voters for the petitioner. This was objected to, as there was no allegation in the petition, that he ought to have been returned. The question was per-

mitted to be put; but it was observed by one of the committee, that this examination was to be proceeded in only so far as was necessary to try the credit of the witness, and not by way of recrimination.

elected,

or petitioners who assert their right to the seat;

not by petitioners who only insist upon a void election.

Whether treating at a former election disqualifies an unsuccessful candidate.

elected, to have the return amended in their favour. It is submitted, that the law of Parliament, with respect to bribery, is the same. The direct object, in the application of the law, is the sitting member; incidentally, it may become necessary to inquire, whether a petitioner, who has entitled himself to the majority of votes, and who has therefore become, *de jure*, the sitting member, is, or is not, disqualified by treating or bribery, to retain his seat<sup>m</sup>. If he is so disqualified, he is not *duly* elected; and the duty of the committee being to make a report to the House if he were elected, his disqualification forms a necessary subject of their investigation. But the case is different, where, as in the present, the election and return of the petitioner are wholly out of the question. Here, an inquiry into offences committed by the petitioner would be ineffectual, and any judgment of the committee thereupon would be nugatory. It cannot be pretended, that their judgment against him would prevent him from becoming a candidate, or from being returned, at a succeeding election. Were he returned, and petitioned against on the ground of his having been guilty of bribery, &c. at the first election, the committee appointed to try that petition must receive original evidence of the offence, and could not proceed upon the judgment of this committee<sup>n</sup>. No case, however, has yet been shewn, where evidence of treating at a former election has been held to disqualify a person who had no right to be returned at that election. Even with respect to sitting members, the cases of Norwich<sup>o</sup> and Southwark are in opposition to each other; and it may, perhaps, still be questionable, whether the words "upon such election" are capable of the extensive construction which has been given to them. It has been said, and it is admitted, that no counter-petition can be presented against the pretensions of a petitioning candi-

<sup>m</sup> See the case of Middlesex, *ante*, p. 31.

<sup>n</sup> See the case of Seaford, 3 Lud. 110. Kirkcudbright, 3 Lud. 467. Norwich, 3 Lud. 477. *Ante*, vol. 1. p. 376, 377. case of Hindon, 1777. *cit. ibid.*

<sup>o</sup> The committee determined in that case, "that the disqualification by the statute 7 and 8 Will. 3. c. 4., so far as the same relates to treating, is not prospective to a future election." 3 Lud. 300.

date; but that circumstance does not affect the present question. It is not denied, that the committee have the power to investigate the pretensions of the petitioner to sit in parliament, provided the question were, whether he should sit or not: but in this case, no such question arises. No proof has been given, or offered, to shew that he is entitled to be returned; and it is from such proof, and not from the allegations of the petition, that such a question must arise. The object of the stat. 28 Geo. 3. c. 52. was not to compel the committee to take judicial notice of every fact alleged in the petition, but to secure some redress to the party petitioned against, in case of a frivolous and vexatious petition; and to prevent the House of Commons being troubled with such complaints. No argument can be drawn from that statute, to prove, that it is not competent for the petitioner, at the trial, to admit that he is unable to establish any particular allegation in his petition. The late case of *Coventry*, however, affords a decision upon the present question, in favour of the sitting member: but this committee will judge whether or not that decision is reconcilable to the law of parliament, and to the stat. 7 Will. 3. At present, it stands single, and unsupported either by any preceding or subsequent determination; and although decisions of former committees are entitled to the highest authority, and deserve to be treated by succeeding committees with the same respect with those of courts of more ordinary jurisdiction, yet, even according to the practice of those courts, many decisions have been over-ruled, which have been found, upon a more mature investigation, not to be supported by legal principles.

Stat. 28 G.  
3. c. 52.

*Coventry*,  
1803.

The committee decided, that the evidence in recrimination might be received; and, after having determined (15th Feb.) that Mr. Greville (against whom no proof appeared) was duly elected; and that neither Mr. Williams, nor Mr. Ramsbottom were duly elected; and that the election of Mr. Williams was void, they passed the following resolutions:

Decision,  
and resolutions  
of the  
committee.

" That it appears to this committee, that at the last election for the borough of New Windsor in the county of Berks, John Williams, Esq. hath, by his agents, committed

acts of bribery and treating, whereby he is incapacitated to serve in parliament upon such election.

“ That it appears to this committee, that at the last election for the said borough, Richard Ramsbottom, Esq. hath, by his agents, committed acts of bribery.”

The report was made to the House 16th Feb. and ordered to lie on the table. No further proceedings took place in consequence thereof, with respect to the latter resolutions.

**Incidental point.**

**Proof of  
agency.**

A witness proved, that a house at Windfor belonging to a person of the name of Webb, had been opened about a week before the election, and that a number of the voters in the interest of Mr. Williams had been entertained there every day: that Mr. Cole, an attorney at Windfor, attended Mr. Williams in the town, previous to, and during, the election; accompanied him in his canvas; applied to the electors to give him their votes: and the witness added, that he appeared to be the agent for Mr. W., but stated no further facts than those abovementioned: he further said, that Mr. Cole had also paid to Mr. Webb the amount of the expence incurred in entertaining the voters at his house. The witness was then asked, what passed in conversation between Mr. Cole and Mr. Webb, at the time when this money was paid? The question was objected to; but the committee decided that it might be put.



## CASE XXXVII.

THE BOROUGH AND TOWN OF WEYMOUTH AND  
MELCOMBE REGIS, IN THE COUNTY OF DORSET.

The Committee was appointed on the 10th of February, 1804, and consisted of the following Members :

W. Dickinson, Esq. *Chairman*.  
Hon. Rich. Ryder.  
Wm. Morland, Esq.  
Edw. Wilbraham Bootle, Esq.  
Anth. Hardolph Eyre, Esq.  
Wm. Mellish, Esq.  
Tho. Rich. Beaumont, Esq.  
Geo. P. Holford, Esq.  
Edw. Hilliard, Esq.

Albemarle Bertie, Esq.  
Cha. Smith, Esq.  
George Cumming, Esq.  
John Whitmore, Esq.  
John Calcrafft, Esq. for the peti- }  
tioner, } *Nominees*.  
Benj. Hobhouse, Esq. for the sit- }  
ting Member, }

Petitioner,

John Arbuthnot, Esq.

Sitting Member,

Charles Adams, Esq.

Counsel for the Petitioner :

Mr. Serjt. Lens, Mr. Serjt. Praed,  
Mr. Dampier.

for the Sitting Member : Mr. Adam, Mr. Alexander, Mr.  
Wilfon.

THE petitioner<sup>a</sup> alleged, that the returning officer had received many persons to poll for Mr. Adams who had no votes ; and had rejected many legal voters who had tendered themselves in favour of the petitioner : that the petitioner had the real majority, and ought to have been returned. The candidates returned were Sir James Pulteney, Mr. Steward, Mr. Garthshore, and Mr. Adams<sup>b</sup>. Petition.

<sup>a</sup> The petition was presented, 6th December 1802 ; renewed, 25th November 1803.

<sup>b</sup> Weymouth and Melcombe Regis

were formerly distinct boroughs, and returned two members each. They were united by st. 13 Elis. c. 9. (private act.) See D'Ewes's Journals, p. 554.

Right agreed, 1730.

The right of election in this borough was agreed before the committee of elections, 7th May 1730, to be "in the mayor, aldermen, bailiffs, and capital burgessees, inhabiting in the borough, and in persons seised of freeholds within the borough, and not receiving alms." This agreement does not appear to have become a last determination of the House of Commons.

Statement of the right by the sitting member.

As soon as the case of the petitioner had been opened, which consisted almost entirely in a charge of occasionality against the freeholders in the interest of the sitting member, the counsel for the latter remarking that there had never been yet any resolution as to the right of election in this borough adopted by the House, delivered in a statement of a particular right for which they meant to contend, in the following words: "That the right of election in the borough of Weymouth and Melcombe Regis in the county of Dorset, is in the mayor, aldermen, bailiffs, and capital burgessees inhabiting within the borough; and in persons seised of entire freeholds within the said borough, whether by descent, devise, or purchase, and not split or divided unless split by descent or devise; and not receiving alms."

Right not disputed at the election.

It should here be mentioned, that the right, as agreed on in 1730, had been acted upon at the last election, without dispute, by each party: it also appeared, that the counsel for the petitioner had, at the election, objected to one or two voters for the sitting member, who tendered their votes for divided tenements. The counsel for the petitioner professed that they had not expected the right would be disputed before the committee, and they delivered a statement of the right in the terms of the agreement in 1730.

Statement for the petitioner.

Proceedings.

The committee determined, that they would first decide upon the right of election; and that the sitting member should first begin, and offer evidence in support of his statement. The foundation of this resolution was, that the sitting member, having at the election admitted the right, as agreed in 1730, it behoved him, in the first instance, to establish his objections to it. The next day, it was submitted

on the part of the petitioner, that although an agreement of the right by the candidates could not conclude electors who were not parties to it, yet the candidates, who in the present case were the litigant parties before the committee, having submitted to it, and acted upon it, were concluded by it, and could not now be heard to object to it<sup>d</sup>: that at least, some notice should have been given to the electors, whose rights would be affected by it: that it was utterly impossible in this case, for the merits of the petition to depend upon a disputed right of election, inasmuch as both the candidates had stood upon the same right: and therefore, that the committee were not authorized by the stat. 28 Geo. 3. c. 52. s. 25. to require statements<sup>e</sup>, or to decide upon the right. It was answered on the part of the sitting member, that although he had admitted the agreement in 1730 to contain the true right of election, he had not precluded himself from putting his own construction upon it<sup>f</sup>; which was, that the freeholds therein mentioned must be entire freeholds from time immemorial, unless divided by act of law: that if this construction were adopted by the committee, he should be able to strike off several of the voters for the petitioner, as having voted for tenements divided, since time of memory, by acts of the parties; it was therefore apparent, that the question arising on this petition did, in part, depend upon a disputed right of election. If the electors felt themselves wronged by the decision of the committee, a remedy was provided for them, by way of appeal against it<sup>g</sup>. The committee, after a long deliberation, rescinded the resolution of the preceding day respecting the order in which the trial should proceed, and required of the petitioner to prove the right as stated by him. They also resolved, that the electors might appear by themselves, or their counsel, before the committee.

Parties not concluded by agreement at the election, from contesting the right before the committee.

Electors may be heard on the right of election, (though not petitioners,) where there has been no notice that the right would be contested.

<sup>d</sup> See the case of Chippenham, *ante*, vol. 1. p. 263. *Mountain v. Adkin*, *post*, note (A.) at the end of this case.

<sup>e</sup> They may require them, where they are of opinion that "the merits of such petition do wholly or in part depend on any question or questions

which shall be before them respecting the right of election," &c. s. 25.

<sup>f</sup> For cases of resolutions, and last determinations explained, see 2 Heyw. 222—256.

<sup>g</sup> By st. 28 Geo. 3. c. 52. s. 26.

Evidence for  
petitioner as  
to right of  
election.

The evidence on the part of the petitioner consisted first, of the entries in the Journals of the House, 3d June 1714. vol. 17. p. 664.

The following abstract of them contains what is necessary for understanding the arguments, and the determinations of the committee in the present case.

Report of  
the commit-  
tee, 1714.

A petition was presented by four unsuccessful candidates<sup>a</sup>, praying for the return, and was referred to the committee, who made their report to the House on the 25th of May 1714; but the House being informed, that there were several resolutions relating to the rights and qualifications of electors within the said borough, which were not inserted in the report, though they ought so to have been; ordered that the report should be withdrawn, in order to the making the same more perfect<sup>1</sup>. On the 3d of June, the amended report was made<sup>2</sup>: it begins by stating the rights for which the parties contended, namely, in the mayor, aldermen, bailiffs, capital burgesses, and freeholders having a freehold in the corporation, as the petitioners alleged: but, according to the sitting members, in the same persons, with the addition of the recorder, and town clerk; it is added, however, that "the counsel on both sides submitted the right of election to be according to the determination of the House of Commons in the last controverted election<sup>3</sup>; and did not further contest this point." Then the numbers on the poll are stated; and it is proved, that many voters for the petitioners came from distant places with conveyances just written, of which they would give no account; nor whether they were in possession; nor whether the grantors had a freehold: several for the petitioners were split votes, and from grantors who had only leaseholds. The first splitting of votes for this borough, which began to be any ways notorious, was in Oct. 1710; in 1711 they went farther, and in this last election they went as far as (the witness thought) they could go, on all sides: he believed the new votes on all sides were of the same nature. There were upon the poll

<sup>a</sup> 3d March 1713. 17 Journ. 479.

<sup>1</sup> Ib. 648.

<sup>2</sup> Ib. 665.

<sup>3</sup> *Quære*, What determination of the House is alluded to?

58 new votes for the petitioners, and 186 for the sitting members. The witness could not tell how many of the petitioners' votes were bad, but he said, that those made in 1710 were of the same nature with those made since.

"Then negative questions were moved; and, being insisted upon, were put, and passed in the negative; which, if thereby made affirmative resolutions, are thus:

"Resolved, that it is the opinion of this committee, that those persons who had no right of voting in the election of members to serve in parliament for the borough of Weymouth and Melcombe Regis, in the county of Dorset, at Lady-day 1710, and not claiming by purchase for a valuable consideration, or by will or descent, since that time, had a right to vote in the last election of members to serve in parliament for the said borough."

"Resolved, that it appearing to this committee, that divers scandalous and illegal practices have been lately carried on, in the borough of Weymouth, &c. to multiply voices in order to the last election of members to serve in parliament, it is the opinion of this committee, that all such persons, whose votes were not admitted at the determination of the last election in parliament for the said borough, and who have not acquired a right by descent or devise since that time, had a right of voting in the last election of members to serve in parliament for the said borough."

The petitioners then gave evidence to establish 59 rejected voters, by proving their titles; and proceeding to strike off 165 voters for the sitting members, they proved that 14 of them had been treated<sup>a</sup>; but before they had offered any fur-

<sup>a</sup> These resolutions never should be mentioned without the passage by which they are introduced; since the reader might not be aware that these extraordinary propositions are produced by the change of two negatives to an affirmative in such a whimsical manner. These two resolutions had been omitted in the first report.

<sup>a</sup> It seems to have been understood in those times, that a voter who had

been treated, was disqualified. See Steyning, March 20, 1711; the petitioner objected to all Lord Belknap's voters, as bribed or treated. 1b. Feb. 17, 1710, 30 objected to for bribery; 10 for treats. Boston, 20th March 1711, four were excepted to by the sitting member as being bribed; 27 treated; and five for bribery and treating others: by the petitioner, five for being treated, and two for treating.

## ELECTION CASES.

ther evidence, the committee came to the following resolution :

“ That it is the opinion of this committee, that no freeholders of the borough of Weymouth, &c. made since the election of members to serve in parliament for the said borough in April 1711, unless claiming by devise or descent, had any right of voting in the last election of members to serve in parliament for the said borough.”

Upon the 3d of May the committee met again, and came to this resolution :

“ That it is the opinion of this committee, that all conveyances to split and divide the interest in any houses or lands in the borough of Weymouth, &c. among several persons, in order to multiply voices at the election of members to serve in parliament for the said borough, are illegal and void.”

The petitioners' counsel objected against 151 of the sitting members' voters, as freeholders, made since the election in April 1711, not claiming by devise or descent, and bad votes. Then follow the names of these persons.

On the 7th of May, the sitting members insisted that none of the 59 persons rejected by the mayor, ought to be added to the petitioners' poll, for that their deeds were fraudulent, no consideration money having ever been paid, nor any possession had under them ; and they read from their notes the reasons for which the mayor had rejected them ; as, for deriving titles from leaseholders, for other defective titles, for not producing their deeds, not giving any account of their freeholds, being split votes ; and among these were the votes of “ Daniel Arden, junior, because a split vote, being part of the Golden Lion, for which his father had voted ;” and of “ Elias Reed, and Thomas Foster, because they were split votes under Thomas Offett, who had voted.”

The sitting members proceeded to disqualify 68 upon the petitioners' poll, and to establish some of their own which had been objected to on the other side, and to prove bribery in the petitioners.

Then follow the resolutions of the committee, that three of the sitting members were not duly elected, and that three

three of the four petitioners were duly elected. The fourth sitting member had been admitted to be duly elected; and the committee had been discharged from proceeding upon the petition of the fourth candidate.

It is remarkable, that although the clerk of the crown was ordered to amend the return, it is not stated in the Journals, that the House agreed with the committee in any one of the resolutions.

The petitioner, secondly, gave in evidence the agreement, 7th May 1730, already mentioned. Agreement, 1730.

Thirdly, they called as a witness Mr. Manfield, who attended the poll for the petitioner, and who deposed, that the agreement in 1730 had been read by the counsel for one party, and acceded to by the counsel for the other: on his cross-examination he admitted that the counsel for the petitioner had objected to a person voting for a part of a house or tenement, another person having already voted for the other part, and that the voter had been rejected. Parole evidence.

It was attempted on the part of the sitting member to prove, by evidence of usage and reputation, that a tenement split by the act of the parties since the time of memory, did not give a right to vote; but this evidence appearing to consist in the declarations of persons interested, was rejected by the committee. See this among the incidental points of the case. Evidence for sitting member.

The oral evidence of usage having thus failed the sitting member, his counsel argued in support of the statement delivered in by them; 1. from the law of parliament in general: 2. from the st. 7 & 8 W. 3. c. 25. s. 7; 3. from the history of this particular borough, as it appeared from the entries in the Journals. Argument for sitting member.

The variety of the elective franchise is that which principally produces the complete representation of every order and interest in the state. It materially contributes to preserve the independence of parliaments. The cause of it continues to be the subject of speculation and conjecture; but certainly it was the effect of accident, not of design, nor was it introduced with any view to those beneficial consequences Advantage of the variety of elective rights.

Concurrent  
rights.

Freehold  
rights.  
1. simple.  
2. qualified.

Where qual-  
ified, the  
member  
limited.

Estates split  
since ft. 7 &  
8 W. 3.  
c. 25. do  
not give a  
vote.

sequences to our constitution which were about to accrue from it. In the borough of Weymouth and Melcombe Regis the rights of the corporators, and of the freeholders of the borough, concur; an union, of which instances are also to be met with in other places<sup>\*</sup>; the right of the freeholders only forms the subject of the present discussion. This right exists in some boroughs simply; in others, sometimes combined with certain other qualifications and restrictions, as of value, of entirety, of antiquity, of certain services due, of the nature of the estate, or of the duration of the interest; not to mention the right by burgage tenure, which may properly be said to form a distinct class. Now it is to be observed, that in all the cases where the restrictions of value, or entirety, or antiquity, are attached to the freehold, no more than a certain number of electors can exist; but where there is no such restriction, any person although possessed of but a small estate within the borough, may carve it out by legal, and even by sincere and *bonâ fide* conveyances (for this is not a question of occasionality) to an infinite number of persons, who thereby acquire a right of voting. It cannot be denied that this is a great inconvenience, tending to produce frauds and endless contentions; and it is therefore submitted in the first place, that the restriction contended for by the sitting member, is warranted and justified by the law of parliament in similar instances; and by its own reason and convenience, inasmuch as it renders such abuses impracticable. Moreover it is submitted, that by the ft. 7 & 8 W. 3. c. 25. s. 7<sup>p</sup>, the holders of estates that can be shewn to have been divided by the act of the parties

\* See the argument for the sitting members, in the case of Tewkesbury, *ante*, vol. 1. p. 179. and the cases there referred to. Wareham and Norwich may be added; the right in St. Alban's is not as it is there stated.

<sup>p</sup> "That all conveyances of any messuages, lands, tenements, or hereditaments, in any county, city, bo-

rough, town corporate, port or place, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are hereby declared to be void and of none effect, and that no more than one single voice shall be admitted to one and the same house or tenement."



at any time since that statute, are not entitled to vote<sup>1</sup>. It is not material to inquire, whether it be necessary to shew the entirety of the estate in the year 1696, when the statute was made, or whether it be sufficient to shew the entirety of it as far back as memory can reach; because the latter proof would be sufficient to raise a presumption of its entirety since 1696, and long before, if it were necessary for the voter's title. The statute having in the former part of the clause excluded the holders of the legal estate while out of possession, and, 2. having provided against the fraudulent and occasional multiplying of votes; 3. enacts, that "no more than one single voice shall be admitted to one and the same house or tenement." It could hardly be meant that although only one person might vote for one tenement; yet, that if any person chose to divide his tenement into a thousand tenements, so many persons might vote for them respectively, but no more. If this be the construction of the act, it is difficult to say against what mischief it was directed, or what inconvenience it was intended to prevent; but if not, then the only construction which remains is this, that no vote shall be given for tenements divided since the passing of the act; for the words "one tenement," must either refer to what was one tenement at the passing of the act, or to what has become one tenement since that time, and it has already been shewn that they cannot refer to the latter, inasmuch as that construction would leave room for every possible extent of division and multiplication, as much as if the statute had never been made. And the construction now contended for received the sanction of the House of Commons in the case of the borough of Whitchurch<sup>2</sup> 1708, wherein it was decided, that the right of election was in the freeholders only of lands or tenements, in right of themselves or their wives, "not split since st. 7 & 8 W. 3." It will be said that the constant practice in cases of county elections, affords an authority to shew that the

Whitchurch  
1708.

Freeholds in  
counties.

<sup>1</sup> See the case of Haslemere, 2 Ld. Cl. p. 327, &c. where this point was argued, but the committee did not come to a decision upon it: they, however determined in favour of the sitting

members, against whom the objection of splitting, &c. had been made. See also, 1 Heyw. 101. ante, vol. 1. 369.

<sup>2</sup> 21<sup>st</sup> December. 16 Journ. 5a.

statute does not apply to tenements fairly divided since the year 1696; but those cases are widely different from the present; the operation of the statute has been relaxed in the case of counties, not only because of the intolerable grievance which would have resulted from a strict application of it, but also because the restriction in point of value which had been before attached to that right of election<sup>1</sup>, prevented any evil consequence from a relaxation in that particular instance. Although therefore, in one case, this relaxation might be called for by the great hardship which attended the stricter construction, and might be justified and rendered safe by the operation of an additional restriction; yet, it does not follow that the same rule is to be adopted in another case, where neither the same hardship exists on the one hand, nor the same restriction operates on the other<sup>2</sup>. And indeed it sufficiently appears from the stat. 10 Ann. c. 23. s. 1. that the fair division of estates in counties was not considered as within the statute of William; for the statute of Anne, professing to extend and enforce the provisions of the former law with respect to the election of knights of shires, confines its penalties and prohibitions to fraudulent conveyances only, and in s. 2. requires a year's possession in purchasers for a valuable consideration. It is remarkable, that both by this statute and by the st. 13 G. 2. c. 20., and 19 G. 2. c. 28. relative to places that are counties of themselves, the case of these freehold boroughs is not mentioned, but they are left to the full operation of the statute of William.

10 Ann.  
c. 23. s. 1.

St. 13 G. 2.  
c. 20. 19 G.  
2. c. 28.

Proceedings  
in the House  
of Com-  
mons.

But the proceedings in the House of Commons respecting this particular borough, shew, that there at least it is necessary that the freeholds should be entire, and that they should have so continued from the passing of the statute, or in other words, as far back as memory can reach within that time. It appears that the report of the committee in the year 1714 was first made on the 27th of May, and that it was referred back to them by the House of Commons, in order that certain resolutions of the committee, which had been omitted, might be inserted. On the 3d of June the report was

<sup>1</sup> By st. 10 H. 6. c. 2.

<sup>2</sup> See 1 Heyw. 99.

again brought up and read : it begins with stating the right of election as first alleged by each party, but adds, that they both submitted " the right to be according to the determination of the House of Commons in the last controverted election : " the determination, however, does not appear in the report of the trial of that election, which took place at the bar of the House on the 12th, 18th, and 22d of May 1711 ; nor is there to be found in any other part of the Journals, any determination respecting the right of election in this borough. It is not unreasonable to suppose, however, that this determination being passed not long after the decision in the case of Whitchurch already mentioned, and relating to a borough in similar circumstances, was of the same nature. However, it appears by the evidence, coupled with the resolutions passed by the committee, that the splitting of freeholds was considered as a fundamental objection to the right of voting in the borough of Weymouth ; it appears also from the evidence of Charles Langrish, that his opinion of a good freehold was, that it should be a *statutable* freehold, adverting to the statute of William, already observed upon. The resolutions of the committee indeed, seem to connect the splitting of the freeholds with the purpose for which they were split, namely, the multiplying of voices ; but it already appears from the words of the statute, that the undue multiplication of voices was rather the evil consequence intended to be guarded against, than the essence of the act prohibited, which consisted merely in the division of the estate. The exception of a division by will, although not, strictly speaking, the act of law, is introduced into the sitting member's statement, because it is found in the first resolution of the committee in 1714. So in the case of Wareham<sup>u</sup>, 19 Jan. 1747-8, the qualification of a year's possession was dispensed with, where, the freeholders had obtained their estates by descent, devise, marriage, marriage-settlement, or promotion to some benefice in the church.

Report, 3d  
June 1714.

Wareham,  
1747.

Lastly, it is submitted, that by the provision of the statute that only one person may vote for one and the

Freeholds  
must be  
entire.

<sup>u</sup> 26 Journ. 481.

same house and tenement, it is required that he who votes should be in possession of the whole of the tenement to which the right of voting was formerly attached; otherwise endless confusion would ensue; for it would be impossible to determine to whom, of several owners of a divided estate, the right belonged. It is said, indeed, by one of the witnesses in the year 1714, "That Elias Read and John Foster were rejected, because they were split votes under Thomas Offett, who had voted  $\pi$ ;" but it does not follow from thence that Thomas Offett's vote was admitted for only a part of the estate, since it is more probable that he tendered his vote for the whole. "Thomas Arden junior, was rejected, because a split vote; being part of the Golden Lion, *for which*" (i. e. the whole of which) "his father had voted."

Argument  
for peti-  
tioner.

Though  
the number  
limited, still  
the free-  
holds need  
not be entire.

Freeholds  
multiplied  
to an extra-  
vagant de-  
gree, would  
shew occa-  
sionality.

The counsel for the petitioner insisted, that even if the construction contended for on the other side were right, and if only one vote could be admitted for what was one tenement in 1696, still that would not exclude the vote of a person who tendered it in virtue of a tenement, although a part of it might have been alienated since the statute; and that the question of preference between two or more persons entitled to portions of the same ancient tenement, was rather a point to be decided between the claimants as it arose, than the foundation of an argument for the exclusion of them all  $\pi$ . To the rest of the arguments for the sitting member they gave the following answer: It has been argued, that the inconvenience of suffering freeholds to be multiplied *ad infinitum*, is much greater than any that can result from enforcing the necessity of preserving them entire from time immemorial; but no such inconvenience is to be apprehended; for it is obvious that there could be but one reason for multiplying estates to the extent supposed by the sitting member, namely, the increasing the number of votes: in which case the objection of occasionality would apply to them. Any inconvenience which may arise from a *bonâ fide* division of an estate, is such as results from the law as

$\pi$  17 Journ. p. 666. col. 1.     $\pi$  See Chippenham, *ante*, vol. 1. p. 281.

it stands at present, and if necessary, must be remedied by new laws; for it cannot be contended that the statute of William applies to tenements in being at the time of the passing of it, when the construction invariably put upon it, both in counties and in other places, has been adverse to that doctrine. In counties indeed, as it has justly been observed, an extravagant multiplication of votes is provided against by the restriction contained in the statute of H. 6.; but as with respect to them, this is the only limitation which remains, so with respect to freehold boroughs, not being under the operation of that law, no limitation whatever exists, and the most minute estate will confer a vote, except, as has already been observed, so far as that minuteness carries with it very pregnant evidence of the fraud, or occasionality of the grant. The fallacy of the argument drawn from the statute of William, is, that it proves too much, in several respects: for, if the construction was so clear as it is pretended, it would be impossible to deny that it would operate equally in counties, and other freehold boroughs; yet no instance has been produced in which such an application of it has been even named, except in the single case of the borough of Whitchurch. That case admits of two observations; first, that it strongly partakes of the nature of burgage tenure; secondly, that considering the period in which the determination was made, (1708), it rather appears that the time of passing the statute was taken as a convenient criterion of occasionality, being the very year in which so strong a law was made against it, than as a limitation arising from the enactment of the statute itself: not to mention the small weight due to a solitary case, in opposition to the unvaried practice of a whole century. Again, this argument proves too much; because if true, every division whether by act of law, or of the parties, since the statute, must fall equally within its provisions: the sitting member, however, contends, that a multiplication, by the act of law, is valid; whereas the statute makes no such distinction: and even this distinction will not support him throughout the whole of his statement; for he sets up an exception also in favour of devise, and marriage, which are acts of the parties.

Therefore

Agreement  
1730.

Therefore his statement, as far as it is founded upon the statute of William, according to his own construction of that statute, falls to the ground. The identity and entirety of the estate are not to be confounded with the reality of the qualification: for the statutes, and last determinations, which require a certain length of possession, (except in certain cases, as of devise, descent, marriage, &c.) were made with a view to prevent occasional and collusive qualifications, not to preserve the entirety of the freeholds, as stat. 10 Ann. c. 23. stat. 13 G. 2. c. 20. stat. 18 G. 2. c. 18. stat. 19 G. 2. c. 28.; and the case of Wareham 1747. The observation made on the part of the sitting member, that the stat. of Anne was made to give vigor and effect to that of William, in the case of shires, strongly shews, by a comparison of the two statutes, that the real scope of the latter was to prevent fraud and occasionality, and not to limit the number of electors. The preceding words of the same clause, which are all directed against collusive and occasional qualifications, strongly support the same construction. It is therefore submitted, in the first place, that the statute of William does not prohibit the fair division of estates: and also, that if it does, the statement of the sitting member is in many respects inconsistent with it. But, it will be found much more difficult to reconcile the agreement in 1730, and the proceedings in the House at that time, with the statement of the sitting member, or with the argument he has raised from the statute of William. For throughout the whole of that trial, and arduous contest, nothing is said of the antiquity, or entirety, or identity of the freeholds. On the contrary, the cause wholly turned upon the fraudulent splitting, and occasionality of the conveyances; and no proof whatever is given to shew what was an entire tenement in the time of King William. The committee indeed resolved to strike off all such votes as had been split since a certain point of time; but that was chosen in the year 1711, when such a number of divisions had taken place, and not from 1696: which evidently demonstrates that they did not proceed

See the case of Petersfield, 1727. 20 Journ. 259. 2 Heyw. 271.

upon the statute of William. They imputed the immense multiplication of votes which happened in the year 1711, to occasionality, and on that ground they struck them off, excepting only in those cases where the title accrued by devise or descent, which exclude the idea of occasionality or fraud. Lastly, they resolved, that all conveyances made to divide the interest among several persons 'in order to multiply votes,' was illegal, and void. No one can fail to observe, that the committee directed their whole attention to the manifest fraud of the case, and not to any particular right of election existing within the borough, and still less to any supposed construction of the stat. of W. 3. It is therefore submitted, that nothing has been offered on the part of the sitting member, either by argument or evidence, to impeach the right as agreed in 1714, and acted upon in the last election, namely, of the freeholders generally.

The committee determined, "That the right of election for Weymouth and Melcombe Regis is in the mayor, aldermen, bailiffs, and capital burgesses inhabiting within the borough, and in persons seized of freeholds within the borough, and not receiving alms."

Determina-  
tion upon  
the right of  
election.

This decision of the committee having been declared, the counsel for the petitioner proceeded to give evidence to disqualify several of the sitting member's votes for occasionality. The sitting member in his turn objected to many of the votes for the petitioner, upon various grounds, such as leaseholds, splitting, defective titles, &c. But in the event none of the particular votes were decided upon by the committee; such a number of the sitting member's objections being admitted to be clearly made out, as, together with some objected votes of the sitting member, also admitted to be fully established, gave the latter a decided majority. There remained for the determination of the committee several other votes of the petitioner objected to, and others of the sitting member supported, on particular grounds, which must also have been disposed of, before the objection of occasionality to the recent conveyances by Sir W. Pulteney and others, could properly come in question. As however, the former authorities upon this subject, and

Further pro-  
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Occasiona-  
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Classes of  
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particularly the late case of Okehampton, were most fully and ably discussed, the substance of the argument of Mr. Serjt. Praed for the petitioner, and of Mr. Adam for the sitting member, is here added. But as it is merely intended to give the general view of the law taken on both sides of the question, it is not necessary to give a detail of any of the particular facts which were proved, and which gave rise to many observations in the course of the argument, which also are omitted here. The reader will observe, however, that three classes of voters were objected to by the petitioner: one, of 8 persons, whose estates had been granted to them by Sir W. Pulteney within 6 weeks of the election; the second, of 6 persons, to whom Mr. Williams had granted their estates between 6 and 8 weeks before the election; and the third, of 5 persons, to whom Sir W. P. had granted their estates in 1790, at the eve of an election, when a contest was expected. The estate granted, was in general the reversion expectant upon a lease for 99 years determinable upon three lives, to hold to the grantee, for the joint lives of the grantor and grantee.

#### Argument for the petitioner.

Argument  
against occa-  
sionality.

It is proposed, on the part of the petitioner, to consider this subject rather with regard to general principles of law, than to a multiplicity of decided cases. The use made of the principal cases which have been decided, will be rather to confirm those principles than to decide the question by the authority of the cases themselves; for whatever may be the value of precedents, reason is the most sure and satisfactory guide and ground of law. The propositions submitted are these:

1. There is, in the law of parliament, an objection, called occasionality, entirely independent of, and distinguishable from all statutory provisions: and also from fraud.

2. By the term fraud, as it is here to be understood, nothing offensive is insinuated, nor any criminal or immoral intent imputed.

3. There are three species of fraud: 1. where a man pretends to have an estate, or other qualification, and has it not:



not: 2. where he apparently is in full possession and enjoyment of it, but where, notwithstanding, there is a secret trust annexed to it, either expressed or implied, which does not leave him at full liberty to dispose of it as he pleases: 3. where the estate is absolute, but where a secret trust is annexed to the vote: if the possessor of the estate has not the full power to dispose of the vote, as well as of the estate, the vote is void. And it is immaterial whether the estate be obtained upon a secret trust to vote in a particular interest at one election, or at all elections; the vote is void as long as the secret trust continues; that is to say, the disability still accompanies the unlawful purpose.

An occasional voter is one "whose qualification, whether from estate, office, or other cause, is conferred or taken, for the purpose of voting at an election for a particular candidate, or in a particular interest." Definition of occasionality.

The case of Suffolk, 1st April 1690<sup>a</sup>, where it was complained that several hundred freeholders were made after the teste of the writ, shews, that occasionality was considered as an objection at common law; and the same appears from the case of Durham, 11th May 1762, where 215 freemen were struck off the poll for having been made at the eve of the election, to serve certain purposes<sup>a</sup>. The time, however, makes no difference, nor whether the creation of votes took place before or after the teste of the writ; these are circumstances and proofs of occasionality, but do not constitute the essence of it, which is the creation of the vote for a particular purpose. It was indeed argued in the case of Bedford 1775<sup>b</sup>, that by the Durham act a limitation of time had been imposed, and that no vote could be called occasional which had been created above a year before the election; but the argument for the petitioners, drawn from the general nature of declaratory statutes, abundantly answers that proposition: there, however, it is admitted on all sides, that no limitation of time exists, except where it has been imposed by statute; therefore in the present

<sup>a</sup> 10 Journ. 361.

<sup>b</sup> 2 Ld. GL 90.

<sup>c</sup> 29 Journ. 337.

case at least, occasionality is to be considered as it existed at the common law. The restrictive statutes in other cases did not repeal the common law, but added new force to it: it did not declare that what before was occasional should now be considered as sincere, but that what might or might not be fair, should, if done within a certain time, be *ipso facto* deemed occasional; making exceptions, however, in favour of those cases where occasionality could not take place.

The qualification may be real, though occasional.

It is plain that occasionality comprises, in some degree, an idea of reality: occasional freeholders, freemen, or inhabitants, are still freeholders, freemen, and inhabitants: it would be absurd to call him an occasional inhabitant who is no inhabitant at all. And in this appears the distinction between occasionality and fraud; because the latter is always opposed to reality: here also appears the distinction between the objection which arises from occasionality, and that which is founded upon the statute 7 & 8 W. 3. which is directed against the multiplication of voices, either, 1. by parcelling out several tenements to several persons, or, 2. by dividing among several persons the same tenements with that intent: for by the statute, the estate itself, and not the vote, is declared to be void; he therefore, who votes in right of an estate so multiplied or split, votes in right of something which he has not, the very estate itself being divested from him by the purpose for which he obtained it: it follows likewise, that every title derived through such a purchaser would be defective, the estate being void in its first creation.

Nevertheless it has happened, that notwithstanding this apparent distinction between fraud and occasionality, these two terms have been so promiscuously used by writers upon the law of elections, as well as by counsel who have argued upon these subjects before committees, that at last many have embraced the opinion that they are the same thing.

Mr. Serjt. Heywood says<sup>c</sup>, that "except with respect to voters in burgage-tenure boroughs, every species of voters,

<sup>c</sup> Vol. i. p. 108.

(freeholders

(freeholders as well as others), plainly occasional, and made *fraudulently* for the purpose of voting, were disqualified by the common law;" which observation, it is apprehended, was not meant to be confined to persons whose votes were occasional, and whose qualifications were also fraudulent; since both in the case of Suffolk which precedes it, and of Petersfield which follows it, no objection seems to have arisen to the voters objected to, from any defect or insincerity in their estates, but only from the *occasion* for which they had obtained them. It is probable that the want of attending accurately to this distinction has been the cause of several decisions, in which committees have established occasional voters, because they have not appeared to be fraudulent; it having been the constant object of those who had the task of defending such voters, to keep the attention of committees studiously directed to the question of fraud; and the fallacy of that mode of discussing the subject not having been sufficiently adverted to. Many more instances might be given of this confusion of terms besides that already adduced; but it may be more useful to cite a passage in which the distinction is most accurately drawn, namely, in the st. 18 G. 2. c. 18. s. 5. which forbids any person to vote, 18 G. 2.  
c. 18.  
1. who has not been in possession above 12 calendar months, (except, &c.) 2. whose estate has been made or granted to him "*fraudulently*, on purpose to qualify him to give his vote:" now it is plain that the first of these provisions is directed against occasional voters, imposing, or rather enforcing, a limitation similar to that of the Durham act, and the other statutes already alluded to; deeming even a fair transaction (taking place within a limited time) occasional, in order more effectually to prevent a creation of votes for election purposes; and as in a corporation, an occasional freeman is not less a freeman than his fellows, so in a county, an occasional freeholder is not the less a freeholder because he obtained his estate in order to vote, provided his case does not come within the statute of William; but in each case the vote is void. By the second provision in the statute of G. 2. fraudulent qualifications are forbidden and punished, that is to say, qualifications that are fraudulent,

not because given on purpose to qualify, but because the estate itself is not fairly conveyed: but if occasionality and fraud are synonymous, either it must be a fraudulent thing to confer a corporate right, or to convey an estate fully and unrereservedly for the purpose of a vote, which is not pretended; or else it is not, nor ever was, occasionality, to create any number of freeholders or corporators at the eve of an election, provided the titles given to them be perfectly solid and sincere; a proposition contradicted by all authorities. This difficulty cannot be solved but by confessing that fraud and occasionality are distinct things; neither can the statute of G. 2. otherwise be understood; for if the legislature was of opinion that there was no such thing as occasionality, except such as consisted in fraudulent qualifications, why should they divide their injunction, and impose distinct penalties on the same offence, under two names? Again, if simple occasionality is no crime, why should they have visited the mere act of voting under a recent conveyance, which is but the evidence of occasionality, with a punishment as severe, as the voting under a fraudulent qualification? And the latter part of the charge shews, that by a fraudulent qualification, was meant that by which the estate did not really pass: for the *onus probandi* is cast upon the voter; but it would be impossible for him to prove negatively that he did not obtain his estate with a view to vote.

To consider, therefore, the question of fraud separately. This subject has already been divided into three parts; concerning the two first of which little needs to be said, for no one will dispute, that he who either has not really the estate, or holds it under a secret engagement to reconvey it, is neither a freeholder nor a voter: it is necessary to examine the third proposition a little more closely; namely, that he who has the estate really conveyed, without any secret trust by which his power of disposing of it may be affected, but is, notwithstanding, restrained as to his vote, by a secret trust or engagement, expressed or implied, is not a legal voter. The case of Mr. Elphinstone<sup>d</sup>, in the House of

<sup>d</sup> 3 Lud. 371.

Lords, which contains much learning upon this subject, has more than once been cited by parties who were contending for very different propositions. The substance of it is this. The freeholders of the county of Renfrew had over-ruled certain objections made to the enrolment of the Hon. W. Elphinstone. On appeal, the court of session was satisfied that there was nothing in the objections made at the freeholders' court; but certain other objections, not there made, were taken in the court of session; namely, "that the claim being founded upon a life-rent grant of superiority of lands settled upon the grantor by a strict entail, with the usual prohibitory, irritant, and resolute clauses against alienation," it had every appearance of being nominal and fictitious. The court, listening to this suggestion, pronounced an interlocutor, by which the objection to his being enrolled was sustained. From this interlocutor an appeal was brought to the House of Lords, and Lord Thurlow, then Chancellor, delivered his opinion in support of the judgment of the Scottish court. Taking the whole of it together, it may be said to amount to this, that although the most diminutive estate, fairly obtained, gives a right to vote, yet that if the grant be coupled with any sort of secret engagement, whether relating to the estate or to the vote, the whole transaction is fictitious and void. "I take the case," he says\*, "to be extremely clear, that by the law of Scotland, the estate which is pretended to be conveyed by these deeds, if it be a real estate, taken and enjoyed by the grantee, fairly and *bonâ fide*, for his own use and benefit, does give a vote for a member to serve in parliament." Now the only benefit which could be derived from the estate of which he was speaking, was the vote itself; he therefore must have considered it necessary that the vote should be at the absolute disposal of the grantee. He afterwards puts the case of an estate of 6d. a year, mortgaged for 10s. at 5 per cent. conveyed at the expence of 30l. and he considers it quite clear, that *ex facie* of such a transaction, it would "be deemed an intentional evasion of the law, upon the part of

Cafe of Mr.  
Elphinstone.

\* 3 Lud. 373.

the grantor and grantee." He gives the following reason for that opinion: "In the case of such a wadset, my idea is, that it would be a fraudulent vote, though the voter had taken an estate sufficient (as the law of Scotland says) for the purpose of voting. But as he has taken it in such circumstances as shewed that it was not calculated to serve *his own* purposes, therefore it would afford pregnant evidence of fraud." He proceeds to give his opinion, that if such an estate were bought for the purpose of enjoying the franchise, that estate would convey the vote; but if it were held under an honorary engagement, "the most imperfect in point of actual obligation;" if it amounted only to a confidential vote; he holds it to be no vote at all. In the case of Mr. McPherson\*, Lord Thurlow considers how a person would reason, to whom an offer of such an estate, in certain circumstances, should be made; if he were inclined to serve the party, he would ask no questions, but take his vote and poll; or else he would say, "if there is the least degree of understanding that I am to vote for any candidate you may put up at the next election, from any notion of honour with regard to you, I will not take it." He then adverts to the difficulty of proving such secret engagements; "but sometimes," he says, "it may be understood from circumstances: as many proofs as I can get, I will get; and what I cannot get at, I will not decide upon; but I will go as far as I can." Both in this case and the former case of Mr. Elphinstone, the House of Lords sustained by their sentence the opinion of Lord Thurlow, and decided that such secret engagements might be inquired into, as objections to the validity of the estate. Upon this great authority it is submitted, as to the third point in which fraud was said to consist, that a secret reservation and engagement to vote, although existing only in the mutual understanding of the parties, is fraudulent, and destroys the vote.

2d class.

To apply these observations to the facts of the present case. It is submitted that the first class of objected voters fall, 1st, under the head of occasional voters. They were

\* 3 Lud. 379.

\* See the arguments on each side, in a Frs. 187.

made within six weeks of the election, and took their estates for no other purpose but to vote for the candidate whom Sir W. P. should recommend to them. 2. They are fraudulent, for, all having been created by Sir W. P., it cannot be doubted that they considered themselves under an engagement not to dispose of their estates in such a manner as would be injurious to his interests. It is equally clear that they considered themselves bound by a similar obligation in respect to their votes, so that they neither had their estate nor their vote for their own *use and purposes*. 3. They are within the provisions of the statute of W. 3. having been divided from the possession of the same person, into the possession of several, in order to multiply votes.

The second class, of 6 persons, made by Mr. Williams, <sup>2d class.</sup> are liable to the same objections.

The third class, it is submitted, are liable to the objection <sup>3d class.</sup> of fraud, if not of occasionality. They were created in 1790, by Sir W. P. on the eve of an election, and in the expectation of a contest; and although the lapse of time may be said to have cured the occasionality, yet it cannot get rid of the fraud, because the honorary engagement still continues; the vote is not yet free.

The learned counsel then proceeded to remark upon cases of particular votes, which for obvious reasons are omitted here.

He concluded by observing, that the case of Okehampton<sup>a</sup>, on which the sitting member probably relied, differed from the present, inasmuch as there, all the tenements had been proved to be ancient tenements, and the conveyances had been made in general a longer time before the election; but chiefly he submitted to the committee, that as many of the arguments which he had made use of had not occurred to the gentlemen who argued the case of Okehampton, and as the case itself was very recent, and the question of the greatest importance, they would not consider themselves bound by it as an authority.

<sup>a</sup> *Ante*, vol. i. p. 359.

## Argument for the sitting member.

Argument  
for the sit-  
ting mem-  
ber.

The counsel for the sitting member denied the distinction taken by the other side between fraud and occasionality, and insisted that there could be no occasionality, except where fraud could be directly shewn.—The substance of the argument was as follows:

Fraud is  
never inno-  
cent.

The counsel for the petitioner has in his second proposition defined a species of fraud utterly unknown to the law, namely, innocent fraud. Such a palliation contains a contradiction in terms: it implies either a harsh construction of an harmless action, or an excuse for a guilty one: an act, so far as it is a fraud, is immoral and corrupt; when it ceases to be either, it is no longer fraud.

Occasiona-  
lity.

The description given by the petitioner of occasionality, describes no offence according to the law of parliament. It is submitted on the contrary, that there is nothing illegal in obtaining an estate for the purpose of giving a vote at a particular election, for a particular candidate, or in a particular interest, where no fraud appears; and moreover, that the circumstances from which the petitioner argues that fraud as to the disposition of the vote may be presumed, do not raise that presumption; and lastly, that fraud never is, nor ought to be presumed; but must be positively proved.

Fraud and  
occasionality  
are the  
same.

As to the first of these propositions it is submitted, that fraud and occasionality are convertible terms: that they are used promiscuously, and synonymously, has been admitted by the petitioner himself; and it will be shewn, that they are properly so used. In shires, before the 10 Ann, a freehold purchased at any time before the election gave a vote; the limitation imposed by that statute was meant to prevent the creation of fraudulent estates on the eve of an election. Before, a *bonâ fide* purchase within a year of the election, gave a vote; therefore such a purchase must still continue to give a vote, in places, where the statute has no operation: otherwise a purchase, in shires, immediately before the commencement of the year of limitation, must be also held to be occasional; which never has been so considered. No limitation whatever is imposed, by common law, or by statute, upon the conveyance of estates in the borough of Weymouth; the question is therefore to be tried upon  
the



the fairness or fraud of each transaction; and the fraud is to be proved, not to be presumed; whereas the petitioner rests his whole case, as to the fraud, upon the presumption, which he says arises from the recency of the conveyances, the nature of the estates, their minuteness, the situation in life of the parties, their connexion with each other, title deeds not produced, &c. &c.

Now if this question involved any valuable or beneficial interest, the title to which was in dispute, it could not be pretended, that these circumstances would furnish the slightest evidence against the grantee: why then should they be so strongly insisted upon as proofs of fraud, to destroy the right which a man has as well in the estate itself, as in the adjunct of it, namely the vote? which has already<sup>1</sup> been decided by this committee to be a valuable and a beneficial interest, and as such to be a ground for excluding the testimony, and the declarations of the voter. At least it cannot be denied that the elective franchise is an innocent object of desire, subject to such limitations, as are imposed by law upon the pursuit of it.

The cases of Mr. Elphinstone and Mr. M'Pherson, were indeed cases of the utmost importance, whether considered with regard to the great authority of the person whose opinion has been cited, or to the time of the decision, or to the nature of the property from which the question arose, or to the opinions formerly received. Votes in Scotland had been commonly created by an operation unknown to the law of England, namely, by passing away the estate from the grantor, in as many parcels as it contained 400 Scottish pounds; the usufructuary interest being re-conveyed to the grantor, and the bare superiority left in the hands of the grantee, who thereby became qualified to vote. Although several statutes had been passed to forbid and prevent secret trusts, the court of session had held (particularly in the year 1765) that it was not competent to receive evidence, and still less, to examine the voter upon oath, as to any secret engagement or confidential trust of his vote, under which he

<sup>1</sup> See *post*.

might hold the estate. Lord Thurlow attacked this series of decisions; but it is observable, first, that the point in question was not, whether under certain circumstances Mr. Elphinstone or Mr. M'Pherson had a right to their estates, but whether it was competent to the court of session to pursue a particular scope of inquiry, as to the sincerity of their qualifications? What the particular circumstances in the case of Mr. Elphinstone were, we are not precisely informed; but one of them appears to have been, that he derived his estate from a person who had no power to alienate it. In the case of Mr. M'Pherson the court of session held it incompetent to receive any evidence upon the point; therefore it is impossible to foresee either by what proofs the allegation of fraud would have been supported, or what the opinion of Lord Thurlow would have been, as to the effect of them. The judgment given upon the principal case, amounts merely to this: that it is competent to the court of session to inquire into circumstances of fraud, with respect to secret engagements as to the vote: but the opinion, as to what shall constitute an engagement, is founded upon supposed cases, and is extrajudicial. Even that opinion, however, so far from supporting the doctrine contended for by the petitioner, is founded upon the supposition of a fraud proved, not presumed; and of an engagement annexed to the estate, which is actual, though imperfect, as all fraudulent obligations are. He also speaks of such honourable engagements as defeat the legal right to an estate; but it never can be supposed that among such engagements he included the particular inducements which a man might have to vote for a particular candidate. These inducements are as various, as the springs of human action; and of different cogency, according to their different strength; from a preference only one degree removed from indifference, to almost a necessity. Such are the habits of daily intercourse, the ties of friendship, of consanguinity, or of local interest; such are also the memory of past services, and of benefits conferred, which may be of such a nature, and of such a magnitude, as to leave the voter no freedom of choice, or power of refusal, without a violation of the most sacred duties.

ties. Nevertheless, the extent of the petitioner's argument goes to shew, that if a man, actuated by any of these motives, should acquire a right to vote, with the purpose of exercising that right in favour of the person with whom he is so connected, not only the vote is void, but according to his interpretation of Lord Thurlow's opinion, and of his idea of honorable obligation, (as between the grantor and grantee) the title to his estate is null and void also. The parties to such a transaction would likewise be held liable to an information for a misdemeanor, according to a case in 2 Heyw. 344. 416. of the King v. Billingham. But neither the opinion of Lord Thurlow, nor any other of the authorities cited, can fairly be strained to support such a doctrine as this. Lord Thurlow in the first sentence cited by the petitioner, sanctions the purchase of a diminutive estate for the purpose of a vote. Consequently, the circumstance of the expence of the conveyance exceeding the value of the estate, could not be considered by him as *per se* a badge of fraud; and when he puts the case of wadset, the circumstances from which he infers fraud, are 1. the expence of the conveyance being paid by the grantor, (as it should appear by his observation at the end of p. 380); and 2. the estate being redeemable at the will of the grantor: from which he concludes that it is held in trust to vote as he shall direct. He says, that from some circumstances fraud may be inferred, but he mentions none of those circumstances which are insisted upon by the petitioner, but others, which are fraudulent in their own nature, as a possession at the will of the grantor; the conveyance at his expence; a valuable consideration stated, but not paid; a secret trust to reconvey; not to alienate; or, to vote according to the direction of the grantor: such things contain pregnant evidence of fraud. Still referring to colorable grants, he adopts the definition of fraud given at the bar: *aliud agit, aliud simulat*. Does that definition apply to the present case? has any transaction been concealed by a false color? is any thing pretended which has not been done?

Further,

Further, to consider other elective rights to which the petitioner insists that the doctrine of occasionality extends, will it be contended that before the st. 26 G. 3. c. 100. a person going *bond fide* to inhabit a borough at the eve of an election for the purpose of voting, had not a right to vote? The very preamble of the statute gives an answer to the question; it is directed against occasional inhabitants, *i. e.* against persons who were not really inhabitants, but who usurped the franchise, under the colour of a temporary residence, kept merely for the purpose of the vote. So in the instance of corporate rights; except in the case of Durham 1762, which was an enormous abuse of the power of admission by the corporation, no instance can be shewn where at common law the vote of a person who had recently acquired his freedom for the purpose of voting, was set aside; and nothing is more common than for persons to complete their inchoate rights for the same purposes, even during an election. The proposition that occasionality consists in a right sincerely and *bond fide* acquired for the purpose of voting in a particular interest, involves the same absurdities which have been already exposed, when the same purpose was considered as a proof of fraud. The elective franchise is admitted to be a proper and laudable object of desire; but why is it desirable, except for the purpose of supporting the particular objects of the preference of the elector? A desire to chuse implies, for the most part, a preference already existing in the mind. But, says the petitioner, if you desire to chuse, that is fair and laudable; but if you desire to chuse A. or B., that is occasional and illegal. You may settle in a borough, or become a freeman, for the sole purpose of becoming an elector; but if you propose also to support some particular interest, your vote is void. It is submitted that this doctrine cannot be justified, either by the reason of the thing, or by the law of parliament; and that it is equally inapplicable to the case of freehold boroughs, wherein, there being no statutory limitation either as to time or value, it necessarily follows, that an estate of whatever value *bond fide* obtained at any time previous to the election, for whatever purpose, confers  
a right

a right to vote. Therefore occasionality does not imply reality, but implies fraud, which is directly its opposite: it does not consist in a rightful title absolutely obtained for a particular purpose, but it consists in a particular purpose fraudulently sought by collusive means, and temporary expedients. It was on such grounds as these that the 76 votes in the case of Okehampton 1791<sup>k</sup>, were contended to be illegal: the transactions were said "to be colorable and fictitious, not substantial or real<sup>l</sup>." There were also instances of deeds redelivered after the election; and it was said, that sufficient appeared to induce the committee to conclude that all the conveyances were fraudulent, and vamped up for a temporary purpose. The committee agreeing in this opinion, rightly decided that the votes were occasional and fraudulent, and struck them off. But in the case of Okehampton, in the last session, where no such evidence of secret engagements appeared, the committee sustained the votes of above 20 persons, in situations precisely similar to the persons whose votes are now in question, and affected by such evidence as that from which the present petitioner wishes to infer fraud and occasionality. The conveyances were made for the joint lives of the voter and the sitting member, under the direction of the attorney or agent of the latter: the property was divided from the possession of one person into that of several: the freeholds were of no value whatever, except for the purpose of the vote: and the consideration paid was greatly disproportionate to any value that could be put upon the premises. No conveyances were earlier than two years before the election, and one so recent as within 6 weeks; and during the whole of the time a dissolution of parliament was expected. The grantees were strangers at Okehampton, and strongly connected with the sitting member; they had never seen their property, nor could give any account of it; in many instances they had received no rent. From all these circumstances the petitioners insisted, 1. that the conveyances themselves were colorable and fraudulent: 2. that the votes were void upon the ground

<sup>k</sup> 1 Fra. 102.<sup>l</sup> Ib. 115.

of occasionality; but the committee were of a contrary opinion; since it did not appear that the grantee had not the full power to dispose both of the estate and of the vote. So long as the voter might freely bestow both as he pleased, it was not considered as a badge of fraud, that he acquired them with a view of serving his friend; that he treated the estate with all the neglect and indifference due to the possession of so insignificant a thing; nor that in the disposition of the vote, he consulted motives of interest, influence, or honor. This case, therefore, is fully in point to shew, that parliament looks to the reality of the title, the good faith of the contract, and the sincerity of the conveyance; not to the particular motives which have induced the grantor to convey, or the purchaser to obtain the estate.

St. 7 & 8  
W. 3. c. 25.

Lastly, it is insisted by the petitioner, that the estates granted in this case, are made void by the statute of W. 3., having been separated from the possession of one person, in order to multiply voices. But it is submitted, that this statute, as well as the other laws already observed upon, must be taken to be directed against the multiplication of voices by fraudulent conveyances, not against the acquisition of the elective franchise by the purchase of part of an estate: for if it were so, no estate divided since the passing of this statute for the purpose of investing two or more persons with the elective right, would have really passed to the grantees. But the statute 10 Anne, c. 25. is the best legislative exposition of the real scope of the statute of William: reciting the clause alluded to of the preceding statute, the preamble proceeds to declare, that (notwithstanding this provision to the contrary) many *fraudulent* and scandalous practices had been used to multiply votes for shires; and to prevent them more effectually in future, it enacts, that all conveyances made "in a fraudulent or collusive manner" to qualify any person to vote, subject to conditions to defeat or re-convey, shall be held absolutely by the grantee. It is plain, therefore, that both the statute of William and the statute of Anne, were directed against the multiplication of voices by the creation of fraudulent and collusive estates, whereby nothing was intended to pass from the grantor; consequently

quently the cases which come within the definition of occasionality given by the petitioner, do not come within the provisions of either statute; for it supposes the conveyance complete, and the estate absolutely vested in the grantee. The statute of Anne also imposes an oath upon the voter, that his estate has not been granted to him fraudulently on purpose to qualify him to vote; but if such practices as the petitioner condemns, were held illegal, the oath would probably have been enlarged, so as to furnish a security against them likewise. The same observation applies to the st. 18 G. 2. c. 18. The petitioner has observed, that the fifth section of that statute distinguishes fraud from occasionality, and visits them both with the same punishment; and he has asked, why, unless occasionality be a crime, should the legislature have imposed a penalty for voting under a recent conveyance, equal to that for voting under a fraudulent conveyance? The answer is, that the voting under a recent conveyance is no crime; but the legislature, (as it has itself informed us) feeling the mischief of fraudulent qualifications press most heavily on the eve of an election, imposed this limitation as the best mode of preventing them; and then added this penalty, in order to give it effect. And it might be asked in return, why did not the legislature extend this penalty to the obtaining an estate for the purpose of a vote, and to the dividing an estate for the purpose of multiplying votes, by sincere conveyances; since these, according to the petitioner, are offences, by the law of parliament?

18 G. 2.  
c. 18.

The committee determined 23d Feb. 1804, that the sitting member was duly elected: that determination was reported to the House on the same day, together with their resolutions upon the right of election, in the usual form.

Decision  
and report.

#### Incidental points.

The sitting member produced a witness to prove the reputation as to the right of election being in freeholders of entire tenements. It was objected, that before any evidence of reputation could be received, some fact must be proved to lay a foundation for that evidence; as for instance, that a voter had been rejected, because the tenement for which he offered his vote had been split. Upon this, the witness deposed, that one Langrishe had been rejected upon that

Evidence of  
Reputation.

ground at the last election; but it did not distinctly appear that he was rejected because his vote had been split since the st. W. 3. It was said that this was hardly a sufficient foundation for the evidence of reputation, because it did not appear that this voter had been rejected according to the local usage of the borough; for if he came to vote for a split tenement, he was disqualified by the general provisions of the st. 7 & 8 W. 3. The committee determined that the examination should proceed.

*Hearsay of  
an interested  
person.*

The same witness was then proceeding to relate what he had heard from a person of the name of Templeman, since deceased. Templeman had been a freeholder; and it was objected that his declarations tending to narrow the right to a few persons of the same description with himself, could not be received. It was answered that he was equally interested either way: if the freeholds must be entire, he partook of his privilege with the fewer persons: if they might be divided, he possessed the power of communicating the privilege to whom he pleased. The committee rejected the evidence.

The same objection received a fuller discussion immediately afterwards: the next witness, Mr. Tizzard, was about to speak of similar declarations by another freeholder, (Mr. Strickland,) lately deceased; and this evidence was defended upon these grounds; that the interest which a voter had in the elective franchise, was not such an interest; in the eye of the law, as would disqualify him to be a witness: because, it was contrary to law to put a value upon it, or to measure it by money: it was a privilege the enjoyment of which was not magnified, or impaired, by the communication of it with a few persons, or with many: and the case of *Dorchester*, 1 *Ld. Gl. p. 359.* was cited, where a witness against whom the same objection was made, had been received by the committee; and the case of *Cricklade*, 4 *Ld. Gl. 68, 69.*, where the same doctrine was held; it was also contended, (as in the case of *Poole*, 2 *Ld. Gl. 273.*) that no other evidence could be expected on such a question; because the knowledge of these facts would probably remain with those, and those only, who were personally concerned in them. In answer to this, it was said,



said, that the principle of admitting witnesses *ex necessitate* had never been extended so far, as that a person should be allowed to prove his own rights, because no one else knew them; but that even this necessity did not exist in this case, because if the freeholders of entire tenements could be proved to have enjoyed the right exclusively, other persons might be called, who had been rejected. It was insisted that it was the interest of every elector to confine the right to the smallest number of persons; that the elective franchise was not the less the subject of interest, and of value, because it was not saleable; and that many other things were valuable, though not saleable; as an advowson during the time of vacancy: that in this particular instance, the law had acknowledged the interest every man had in his franchise to be valuable, by giving a right of action to him who was disturbed in it, and by confining the right of preferring petitions, to candidates, and electors only; i. e. to interested persons. As to the cases cited, it was observed, that the witness in the case of Dorchester united both the rights contended for by the litigant parties, in himself; a circumstance not mentioned in the body of the report, but subjoined in a note<sup>m</sup>; it was probable, that the Cricklade committee understood the former decision as an authority for receiving an interested witness, and that being ignorant of the fact of his having been equally interested on both sides, and therefore an indifferent witness, they had suffered themselves to be governed by a decision, which, upon examination, appeared not applicable to the case then before them.

The committee determined, "that Mr. Tizzard is not at liberty to speak with regard to what he heard Mr. Strickland say, he (Mr. S.) being interested."<sup>n</sup>

Decision.

The vote of Isaac Davis was objected to by the sitting member. At the poll he had claimed to vote for premises in the occupation of one Lill, and his title deeds were produced before the committee. They were a lease and re-

Evidence received of the voter's declarations against himself, after the election.

<sup>m</sup> Note D. p. 363. *sed quare*; for his evidence went to lessen the number of voters.

<sup>n</sup> See 3 Lud. 571. and the authorities referred to there.

lease, dated some years ago, by which the premises were conveyed to the voter. It was proved that Sir W. P. had received for these premises a ground rent of 6s. from one Jerrard ever since the year 1786, and that upon one occasion, the rent not having been paid, his steward threatened to distrain upon Lill the occupier, who thereupon paid it. The sitting member also offered to prove declarations of the voter, made within a few days, that he had bought a vote for Weymouth, but had never been in possession of the property conveyed to him. This evidence was objected to, on the ground, that the declarations of the voter, after the election, should not be received to prejudice the candidate who had now an interest in his vote, and was to be considered as a third person. 2. That the admission of evidence so easily fabricated, tended to perjury. It was answered, that every thing that went to affect the voter's interest in the freehold, must necessarily affect the vote attached to it; and that the danger of perjury was an objection to the weight of the evidence, not to the admissibility of it. The committee, on the authority of 2 Lud. 411 & 569., admitted the evidence\*.

A third person, who refuses to produce his title deeds which affect a voter's title, need not disclose their contents.

The sitting member objected to the vote of W. Dearling, as being a leaseholder for years. A notice had been given to him to produce all deeds, copies of deeds, writings, &c. relating to his title to the estate for which he had claimed to vote. A lease and release were produced, by which Mr. Brown conveyed the premises to the voter in fee. In this deed was a covenant from Mr. Brown, to produce, when called upon, certain indentures of the date of the year 1783, by which he had purchased this estate among others, from Mr. G. There was also a covenant from Mr. Brown for the goodness of the title as far as concerned his own acts, and for quiet enjoyment against himself, and those claiming under him. The sitting member had served Mr. Brown with the Speaker's warrant to appear and produce all deeds &c. in his custody, relating to Dearling's estate. Mr. B. being called, and refusing to produce his deeds, the sitting

\* See *contra ante*, p. 141, 142.

member's counsel proposed to ask him what interest had been conveyed to him by Mr. G. in this estate? (It appeared that Mr. B. was still possessed of a part of the estate originally purchased by him, as above-mentioned.) It was objected by the petitioners, that Mr. B. was not bound to answer this question, because the answer might prejudice his own title; and that it was dangerous to permit such inquiries into the titles of third persons. It was answered, that the question was confined to the estate of Dearling: that although the title were defective, he was not responsible to D. under the terms of the release; and that therefore his own interest could not be affected by the answer he might give. That he was not only bound by his covenant to produce these indentures, but on this occasion, was required so to do by the Speaker's warrant, which was of greater force than a common *subpoena duces tecum*, because it extended to *all* papers, &c. That the sitting member having done every thing in his power towards the production of a piece of evidence to which he had a right, was entitled to prove the contents of it, by secondary evidence; and lastly, that the effect of excluding such evidence, if Mr. B. was not compelled to disclose his title, would be, that any man possessed of a long term, might convey freeholds for the purpose of making votes, without a possibility of the fraud being detected. The committee determined, that Mr. Brown was not obliged to answer the question.

The sitting member proposed to object to three persons who had voted for the petitioner as capital burgesses. The facts, as stated in the argument, were, that these gentlemen had been elected about 29 years since, and had until lately exercised the franchise of a capital burgess. But previous to their election, the corporation had lost one of its integral parts; the capital burgesses, a definite body of 24, being reduced to less than half their number. This defect had not been discovered till lately, and then gave occasion to the cases of *R. v. Morris*, and *R. v. Stewart*, 3 East, 213. 4 East, 17. when the Court of King's Bench were clearly of opinion that the corporation was dissolved.

Committee refused to hear impeached the titles of voters, who might have been proceeded against by *quo warranto*.

It was objected by the petitioner, that the committee ought not now to receive evidence to impeach these votes. That the voters had never been proceeded against by *quo warranto*, and it was a general rule, that where that had not been done, and there had been a sufficient opportunity, a committee would consider them good. That besides, they were protected by the st. 32 G. 3. c. 58. for quieting titles to corporate offices. That although the corporation was incapable of continuing itself by elections, it was not absolutely dissolved; at least the existing corporators preserved their right of voting, as appeared from the case of Helleston, 1775<sup>p</sup>; and as the right (as it was said) was still exercised in the borough of Malden.

It was answered that this case differed from the cases of Helleston and Malden, because there, the voters had been originally elected into a subsisting corporation, which was afterwards dissolved. Here the dissolution was previous to the election; there was no corporation; therefore there could be no new corporators; no corporate right, or franchise, could be acquired; that although the discovery had not been made till long afterwards, still the fact was the same; and the corporation had ceased to exist, from the moment the capital burgesses became less in number than a majority of 24: that although Lord Mansfield in the case of the Mayor &c. of Colchester v. Scaber<sup>q</sup>, thought that a corporation so circumstanced, might still continue to do corporate acts, that doctrine had been departed from in latter cases. It had been determined by the King's Bench in the case of R. v. Saunders, 3 East<sup>r</sup> 119., that in such circumstances as information in the nature of *'quo warranto'* would not lie, there being in truth no such office in existence, as the defendant was charged with claiming: and although such informations had been granted in R. v. Morris, and R. v. Steward<sup>r</sup>, yet they had been granted only for the sake of putting the facts into a course of trial. There had there

<sup>p</sup> 2 Ld. Gl. 1.

<sup>q</sup> 1 Burr. 1866.

<sup>r</sup> See ante, case of Taunton, vol. 1.

p. 409.

<sup>r</sup> 3 East's Reports, 213. and see ib.

4, 17.

fore been no laches in the sitting member, in not applying for a *quo warranto*, in a case which did not admit of such an application. The same answer applied to the *fl. 32 G. 3.* which was intended to protect officers in subsisting corporations. There having been therefore no opportunity to attack the office claimed, nothing remained but to attack the vote given under it, which could only be done before this committee.

The Committee determined, that evidence should not be received, to impeach these votes<sup>1</sup>.

N.B. The sitting member had two voters similarly situated; but they had not been objected to by the petitioner. Probably the committee would have permitted him to avail himself of the objection, had his own votes been held bad. See *ante*, case of Chippenham, vol. i. p. 273, 282, case of Harwich, *ib.* p. 397. note<sup>1</sup>.

#### NOTE (A), from p. 197.

The following note of the case of *Mountain v. Adkin*, Mich. 24 G. 3. B. R. has been furnished to the reporter by a gentleman of great eminence in the profession of the law, by whom it was taken.

This was an issue arising from an application to this Court for a *mandamus*, directed to try whether the plaintiff or the defendant had been duly elected curate of St. Andrew's church in Norwich. At the trial, the defendant offered to prove an agreement between the plaintiff and the defendant, not to admit the votes of any but resident inhabitants; there having been some question, whether out-voters, that is, persons rated for houses, but not dwelling within the parish, should be admitted to vote. The witness proposed to be called was a resident inhabitant. Ashhurst J. who tried the cause, refused to admit him, and held him not to be a competent witness; the effect of his evidence being to narrow the right of voting, and to confine it to a smaller number, of which

The resident voter is competent to prove an agreement between the candidates that resident voters only should vote. *Quare*, if he be produced to prove the right itself.

<sup>1</sup> See *ante*, Harwich, vol. i. p. 386. note A. p. 479.  
393. East Retford, *ib.* p. 477. and

he was one; and consequently, to render his own vote more valuable. A verdict having been given for the plaintiff, a rule was obtained on the part of the defendant, to shew cause why there should not be a new trial. Mr. Bearcroft and Mr. Partridge shewed cause against the rule, and Mr. Graham argued in support of it.

Lord Mansfield, C. J. This is a question merely between the two candidates. There are no other parties. The plaintiff contends that the right of voting is in all the parishioners, whether resident or non-resident; the defendant, that it is in the resident voters only. The defendant does not rely on the effect of the evidence given, but on that which was offered, and which, it is said, would have proved an agreement made between the parties on this occasion to exclude the votes of non-residents. I own I have considerable doubt whether the witness, notwithstanding the objection which has been stated, was not strictly competent. The objection as to the competency of witnesses has been carried in our law to an extravagant extent. It is founded on a subtilty, which it has been at last found necessary in many cases to meet with an equal subtilty, by which a witness is allowed to be made competent by a release, although it be clear, that the next day he will be replaced in that right which he has relinquished only for the occasion. The trifling interests of freemen and commoners are allowed by this artifice, to be removed, for the purpose of letting in their evidence. The authorities which respect the competency of witnesses must be adhered to; but I am unwilling to draw the line tighter. I have heard Lord Hardwicke frequently say, that where the objection to the competency arising from interest was doubtful, it was better to leave it only as an objection to the credit. *R. v. Bray, Mayor of Tintagel*, 10 G. 2<sup>d</sup>. When the present objection was first made, I thought it had weight in it; but on further consideration it appears, that the witness was not called to prove any right in himself, which could be used on a future occasion, but merely an agreement between the parties in respect of this particular election. This agreement would, in future, afford an argument that the right was not so confined; since it was only by special agreement that the out-voters were to be excluded. From all the evidence, I doubt whether such an agreement was made; but that is not now the question. Mr. Bearcroft says, that the law requires a witness to come without a wish; but that certainly

\* Reported, *Cas. temp. Hard.* 358. P. 290. And see the authorities cited. There is also a note of it in *Buller's N. Caf. temp. H.* 361.

is not so; the nearest relations, the most active and sanguine friends and agents are by law competent witnesses.

But I am satisfied, that in this case there ought not to be a new trial, because it appears from the evidence which was entered into, that the defendant himself relinquished the poll; and it shall not be endured now, that he shall dispute it, having, by his declining before the hour, prevented any more votes from being taken.

Willes, J. agreed with Lord Mansfield as to the inconvenient degree of strictness to which the old law carried the line of the incompetency of witnesses; and said, that where the interest was very small, the rule *de minimis non curat lex* ought to be allowed; and that the testimony should be admitted, being left open to the question of credit. He agreed on the other points, and added, that under the circumstances of the present case, the franchise having been exercised at the time the witness gave his evidence, there was no longer any bias upon him.

Ashurst J. I readily acquiesce in the present determination of the court, and I agree, that the strictness complained of required relaxation; but at the trial I thought that, whether the interest which the witness had was permanent, or only *pro hac vice*, it was a difference in degree only, and not in kind. But on the other ground, I think there ought not to be a new trial.

Buller J. The rule adopted by Lord Hardwicke has been followed by all the Judges; but it applies only in cases where the interest is doubtful. In other cases, it is equally clear, that if the interest be direct, it matters not how small it is; the witness is incompetent. The court cannot calculate the consciences of men, and say, that what would be an interest to influence one man, would have no effect upon another. The rule, therefore, cited by Willes J. is not applicable to the question.

The election was over at the time when this witness was produced to give his evidence; whether this agreement subsisted or not, it was temporary only, and no future right was to be decided by it; so that there remained no cause of influence at the time.

But in my opinion there ought to be a new trial. What the effect of the evidence would have been, if produced, is not known; the whole case has not been before the jury, nor is it now before the court. The resignation of the defendant is not decisive in this case. The rule *ex ore tuo*, applies to cases where the parties alone are interested. In elections of members of parliament, or of corporate officers, the candidates cannot reject voters, or make rules to bind the electors; and although this is not an office which

## ELECTION CASES.

a man can be obliged to accept, yet he cannot stop the poll, and let in a person who has a minority of votes against the will of the parishioners; for it would be easy, by such a collusion, for persons to agree that a particular candidate should be returned, who, without such a contrivance, would not have a majority of votes. At most, there would be a necessity for a new election; for if it were now necessary for a *mandamus* to go, how is the conscience of the court informed, which candidate had the majority? I therefore think there ought to be a new trial.

Lord Mansfield observed, that in this case the electors had made no application; if they had, the question might be different, but he had no doubt that it was a question merely between the two candidates, and that there ought not to be a new trial.

**Rule discharged.**

END OF VOL. II. PART I.



# REPORTS OF CASES

## OF

### CONTROVERTED ELECTIONS.

#### CASE XXXVIII.

THE BOROUGH OF ILCHESTER IN THE COUNTY OF  
SOMERSET.

The Committee was appointed on the 14th of February 1804, and consisted of the following Members:

Sir William Young, Bart. <i>Chairman</i> ,	Dugdale Stræford Dugdale, Esq.
Matthew Russell, Esq.	Hon. Cha. Herbert Pierrepont,
John Penn, Esq.	Chn. Chester, Esq.
Henry Shelley, Esq.	Sir Cha. Talbot, Bart.
John Matthews, Esq.	Sir Robert Buxton,
Richard Benyon, Esq.	Bart.
Geo. W. Gunning, Esq.	Hon. Chr. Hely
Sir John Frederick, Bart.	Hutchinson
Robert Williams, Esq.	

} chosen by the  
first 13.

Petitioners. John Manners, Esq. against the election of Mr. Brooke.

William Webb, Esq. against the election of Sir W. Manners.

Sitting Members. Sir William Manners, Bart.

Charles Brooke, Esq.

Counsel for Mr. Manners: Mr. Serjt. Williams.

for Mr. Webb: Mr. Piggott; Mr. Wetherell.

for Sir W. Manners: Mr. Plumer; Mr. Pell.

for Mr. Brooke: Mr. Adam; Mr. Serjt. Lens.

MR. Manners<sup>b</sup> in his petition alleged that Mr. Brooke had been guilty of bribery, and of treating; and that several persons who had been declared, by the committee appointed to try the former election, to have been guilty of bribery, and whose votes, for that reason, should have

<sup>a</sup> There being more than two parties. See St. 11 G. 3. c. 42. s. 6.

<sup>b</sup> Presented 25th November, 1803.

<sup>c</sup> See *ante*, Vol. I. p. 305.

been disallowed at the last election, had been received to vote for Mr. Brooke. Mr. M. declined producing any evidence in support of his petition.

Mr. Webb's<sup>d</sup> petition contained charges both of bribery and treating, against Sir W. Manners, and Mr. Manners.

Right of  
election.

The election had been held in consequence of the former election having been declared void. See that case reported, *ante*, Vol. I. p. 302.

The first return of Members to Parliament for Ilchester, according to Mr. Prynne, was in 26 Edw. 1. It continued to send Members till 34 Edw. 3. and then ceased till 12 Edw. 4<sup>e</sup>, after which, (Mr. Carew writes,) it again intermitted, till 1621, 19 Jac. 1., when it was again restored. But Sir G. Moore in his report to the house, 27 March 1621, states that it sent Members till H. 5. 1 Jour. 572, 576. There has been no determination upon the right of election there; nor is the mode of electing Members mentioned in the charter, (3 and 4 P. and M.) by which the inhabitants were incorporated<sup>f</sup>. 28 Jan. 1702-3 the right was agreed to be "in the bailiff, capital burgeses, "and inhabitants, not receiving alms<sup>g</sup>"; and in 1775 it was agreed that a voter for the borough must be a householder, and have a legal settlement there<sup>h</sup>. The same agreement was made and acted upon, in 1784<sup>i</sup>, and in 1802<sup>k</sup>; and upon the present occasion, both at the election, and before the committee.

At the election, the numbers were,

For Mr. Brooke, - - 81

Sir W. Manners, - 76

Mr. Manners, - 75

Mr. Webb, - - 73

Case of Mr.  
Webb.

The counsel for Mr. Webb proposed to strike from the poll both of Sir W. Manners, and of Mr. Manners, the votes of six persons who were said not to be house-holders, or not to have been such for six months previous to the election<sup>l</sup>; against one of these it was also objected, that

<sup>d</sup> Presented 25th November 1803.

<sup>e</sup> 4 Prynne, 1213.

<sup>f</sup> 3 Ld. Gl. 154.

<sup>g</sup> 14 Journ. 147.

<sup>h</sup> Ib.

<sup>i</sup> 1 Lud. 464.

<sup>k</sup> *Ante*. Vol. I. p. 303.

<sup>l</sup> See *ft.* 26 G. 3. c. 100.

he had received parochial relief within a year; and against another, that he had no legal settlement in the borough. They further proposed to disqualify ten persons for bribery, who had voted for the same gentlemen; to shew a general system of bribery and corruption on the part of Sir William Manners and his agents: and to prove, that he had been guilty of particular acts of bribery and of treating.

The counsel for Sir W. M. objected in the first instance against any evidence being received, tending to affect the poll of Mr. Manners; since it had been decided in the case of *Middlesex*<sup>m</sup>, that no petition could be received against the pretensions of a petitioner: that therefore the petition of Mr. Webb, as far as it affected Mr. Manners, was a nullity, and formed no part of the present enquiry. The counsel for Mr. Webb contended, that as Mr. Manners had brought himself before the committee by a petition against one of the sitting Members, (which petition although abandoned on his part, was still under the judgment of the committee, to determine, as well as to the merits of the petition itself, as, whether or not it was frivolous and vexatious,) it was competent to them on the part of their client, to strike off from the poll the votes given for him, and for Sir W. M.; and also, to affect him with bribery.

Objection & that no petition can be maintained against a petitioner.

This discussion was deferred, upon the suggestion of the chairman that it was possible that the question might not arise; and upon his recommendation, it was agreed to enter first upon the trial of the particular votes.

The counsel for Sir W. Manners objected to Mr. Webb's voters on the following grounds: against 18, as not being legally settled; or, as not *bona fide* householders; or, as not having been such for six months previous to the election: against seven, as paupers; against eight, as having been bribed by Mr. Webb; and against 19 as having been proved guilty of bribery at the preceding election, being included, by name, in the resolution of the select committee appointed to try the merits of that election. Eight of the voters for Sir W. M. who stood in the same situation,

Case of Sir W. Manners.

<sup>m</sup> *Ante*, Vol. I. p. 294. *post*. note (A.) and see the case of *Aylesbury*, *post* p. 259.

were given up by his counsel. They also proposed to add one rejected vote to the poll of Sir W. Manners. Lastly, they defended the votes for Sir W. M. that had been objected to; denied the imputations of bribery and treating that had been made against him; and charged Mr. Webb with bribery. The evidence in support of their case occupied from the 25th of February to 5th March when Mr. Plumer summed up the case of Sir W. Manners.

House-  
holder.

During the course of the trial, (27th Feb.) a discussion took place respecting the signification of the word householder in the borough of Ilchester. Three questions arose; 1. Whether under the circumstances of the present case, evidence could be received of the right of election actually exercised in the borough? 2. Whether evidence could be received of the local usage of the borough, and of the practice at former elections there, to shew what description of persons had been accustomed to vote, under the name of householders? And 3. (it having been determined that such evidence could not be received,) what was the proper and legal signification of the word householder<sup>a</sup>?

Evidence  
not admissi-  
ble to alter a  
right agreed  
upon.

Upon the first of these questions, the counsel for Sir W. Manners began to contend that the evidence was admissible, because, there being no last determination of the house, nor act of parliament, nor charter, by which the right of election in this borough was fixed in express terms, no other criterion could be resorted to, than the fact of the exercise of the right: and that the word householder having been introduced by no higher authority than the agreement of parties, it could not be pretended, that any supposed sense of that word ought to be adopted as the criterion of the right of election, in opposition to the matter of fact, and to the actual exercise of the right within the borough. But it was suggested by the counsel for Mr. Webb, and the committee expressed the same opinion, that the counsel for Sir W. M. by his admission of the right as stated in the commencement of this case, had precluded himself from setting up any other right than such as was comprised within the terms of that admission, and there-

<sup>a</sup> *Ante* Vol. I. p. 263, 274. Case of Chippenham

fore, that his argument must be confined to what was the true meaning of the word householder. Whereupon the counsel for Sir W. Manners, offered evidence to shew that by the local usage of the borough, the word householder was held to signify one who personally resided and dieted himself in a house either of his own, or of another of whom he held it as tenant. They supported the admissibility of this evidence upon the ground, that the word householder was vague, and equivocal, and like the word "inhabitant," or "burgess," might have different significations in different places: that it was customary, even in cases where such words occurred in last determinations, for committees to receive evidence of fact as to the local usage, to determine in what sense they should be understood in the particular place respecting which the question arose: that the distinction had always been taken between evidence to contradict last determinations, and evidence to explain them: in the former case, the evidence was rejected; as particularly, in the case of Cirencester, 1792, where it was proposed to shew that it was not necessary for a "householder" to have the control of the outer door of his house; which was plainly contrary to any sense of the word: but that in the latter case it always had been admitted;<sup>p</sup> that therefore, in order to exclude the evidence proposed in this case, it must either be shewn that the word "householder" was of a precise signification, and *en vi termini*, capable of only one strict definition, not to be varied or explained by any extrinsic evidence: or, that the sense attempted to be given to it by Sir W. Manners could in no case belong to it.

Evidence not admissible to shew the sense of the word householder, in a particular place.

The counsel for Mr. Webb, on the other hand insisted, that the term householder was a legal term, and not equivocal, nor to be construed by the local usage of Ilchester, or of any other place: that to admit the evidence of such usage, would be, indirectly, to bring in question the right of election, which had been agreed between the parties: which

<sup>o</sup> 2 Fra. 451. and see Preston, 3 I. p. 64, 379. Tapton, 1775. 1 Ld. Lud. 245. Gl. 371.

<sup>p</sup> See 2 Heyw. 213-258. ante, Vol.

might equally be done by affixing a new and particular meaning to a term commonly used, as by introducing a new term: that the case of Cirencester exactly applied to the present case; for there, the committee determined that the word "householder" must be determined on the general principles of the law of the land, and not on any ideas suggested by local usage<sup>1</sup>. In the other cases referred to, the expressions which gave rise to the admission of explanatory evidence were without doubt equivocal, as the word 'inhabitant,' 'burgess,' &c. and it is not denied, that in such cases explanatory evidence may, and must,

<sup>1</sup> The following are the resolutions of the Committee in the case of Cirencester, 1792. 2 Fra. 449.

"The counsel for the petitioners having stated, and the counsel for the sitting Member having admitted, that according to divers determinations made in the House of Commons on the 21st of May 1624, the 4th of November 1690, and the 8th of December 1709, and the true intent and meaning of the said determinations, as well as by constant usage, the right of election in the borough of Cirencester, in the county of Gloucester, is in the inhabitants, householders, legally settled, that no inmates have a right to vote for the said borough, nor inhabitants of the Abbey, the Emery, and Spiringate-lane; Resolved,

"That it is the opinion of this committee, that no person can be deemed a householder, who does not possess an exclusive right to the use of the outward door of the building, although, by taking inmates, he may have relinquished for a time the exercise of that exclusive right; neither can a person whose habitation is composed of more apartments than one, be deemed a householder, unless he also possesses an exclusive right to the use of the staircase, door-way, or other passage, that forms the means of commu-

nication between his several apartments, although by taking inmates he may have likewise relinquished for a time the exercise of that right.

"The original right to an exclusive use is then the point of discrimination between the householder on the one hand, and the inmate on the other.

"The term *outward door to the building*, does not include within its meaning the gates or outward door of a court or passage open to the sky. A house may contain but a single apartment; yet it does not follow as a necessary conclusion, that a single apartment, though furnished with a separate outward door, will constitute a house; for a shop or stall, unless it be used as a dwelling, is certainly not a house.

On this subject the following resolutions were afterwards added;

"That it is the opinion of this committee, that the legal meaning of the terms *householders* and *inmates* must be determined on the general principles of the law of the land, not on any ideas suggested by local usage."

"That it is the opinion of this committee, that if a passage is considered as a street-passage, (though covered) all the houses that have separate outward doors opening into that passage, are good votes."

be received; but it is only by reason of the ambiguity of the original phrase.

The committee determined, that the evidence should not be received.

An argument then took place upon the legal signification of the word 'householder,' the counsel for Mr. Webb defining it to signify one who has a house either of his own, or as tenant to some other person, in which it was not necessary for him to be actually resident, it being sufficient if he was resident within the borough: the counsel for Sir W. Manners contended on the contrary, that it signified one who both personally inhabited and dieted himself in his house.

Arg. upon the legal signification of the word householder.

The latter began their argument by citing the definition given by Dr. Johnson, of the word 'householder,' in his dictionary: a householder is said to be the 'master of a family' and a housekeeper, in the same book, is said to be a 'householder, master of a family.' The words, 'householder' and 'housekeeper' are used synonymously in st. 26 G. 3. c. 100. From this it may be inferred, that the idea of an actual and personal residence in the house, was inseparably annexed to the term 'householder.' Lord Coke in his commentary upon the stat. 22 H. 8. (of bridges,) explains the word 'inhabitants' to mean in one sense every person, though he have but a personal residence, as servants, &c: but in the sense in which it is used in that statute, to mean only householders; 'so as to distrain upon his lands, goods, and chattels.' All these expressions point to something more than a mere property in, or right of possession of a house, namely to an actual and local residence in it. The word 'householder' refers to a man's house, as his home, in the sense that the word *domus* occurs in the civil law, when it is used to signify a domicile. Domat says, '*eam domum unicuique esse, Quare ubi sedes et tabulas suarumque rerum constitutionem fecisset.*' And, in another place, *domum accipere debemus, non proprietatem*

\* Householder, (*pater familias*), is the occupier of a house, a housekeeper, or master of a family. Jac. Law. Dict. 2 Inst. 703. See Peterborough, 1775, 3 Ld. Gl. 85, 87.

*tem domus, sed domicilium.* So in the criminal law of England, he only is an house-breaker who breaks into the dwelling-house of another; that is, where he sleeps and inhabits. In the common acceptation of the word, a man cannot be said to be the householder of a house in which he does not reside. And the foundation of the right of election was, that it should be exercised by those only, who bore the public and parochial burdens in the borough.

Arg. that a  
householder  
need not re-  
side in the  
house.

The counsel for Mr. Webb, on the other hand, distinguished between a householder, and a housekeeper, and said that the former word did not include the idea of actual residence, and diet, as the latter did. That Dr. Johnson's definition referred to the vulgar acceptation of the word, and not to the legal signification of it: that there was no doubt that a person who possessed a house in a town was assessable under the st. H. 8. although he did not reside in it, and therefore the authority cited on the other side from that statute was against themselves. That the cases of domicile related only to persons who had distinct places of residence, distant from each other; but here, it is admitted to be necessary that the voter should have his residence in Ilchester: and they referred to Mr. Simeon's note of the case of Seaford, 1792, p. 128, 129.

Judgment  
of the Com-  
mittee.

On the following day (28 Feb.) the chairman delivered the opinion of the committee at considerable length: the substance of it was, that since the right had originally been declared to be in the inhabitants at large, and since that right appeared to have afterwards been restricted to inhabitants of a particular description, the committee, adverting to the general principle of the original representation of this borough, would restrain the right as little as possible, and they required only, that the voter should be an inhabitant of the borough legally settled, that he should be the *bonâ fide* occupier of an house within it, either as his own, or as tenant to the owner of it; and that he should have the control of the outer door of it. He further added, that the committee desired it might be understood that they did not take upon themselves to decide upon the precise meaning of the word



word 'householder' as a general term, or to furnish an authority in any future case<sup>†</sup>. }

An important question arose with respect to one of the classes of voters above-mentioned, viz. the 19 persons who had been resolved by the former committee, to have committed bribery: and whom the counsel for Sir W. Mauners contended to have been disqualified to vote at the last election: the case of one of them (Ralph West,) was argued (29. Feb.) by the counsel on each side.

Whether a voter declared guilty of bribery by a committee, the election being avoided, can vote at the ensuing election?

The resolution of the former committee was read, stating Evidence.  
"that it is the opinion of this committee, that the following 32 persons" (&c. of whom Ralph West was one,) "having received bribes previous to the last election for the borough of Ilchester, in the county of Somerset, were thereby disqualified from voting at the said election."

Then the writ under which the last election had been holden was read<sup>‡</sup>. It was admitted that Ralph West had taken the bribery oath at the first election.

The counsel for Sir W. Mannors contended that the vote was void.

The writ, by virtue of which the present return has been made, was issued in consequence of a former writ not having been fully executed; the election holden under that writ having been declared null and void by a court of competent judicature. It is therefore in the nature of an *alias & pluries* writ at common law<sup>¶</sup>; by which the sheriff is commanded, 'as before' (or 'as oftentimes before') he has been commanded, to execute the particular duty expressed in the writ.

Arg. against the vote.

The disqualification of a voter for bribery is not the result of any statutory provision, but of the common law of Parliament. By that law, a person bribed to give his vote at an election is rendered incompetent to vote at that elec-

<sup>†</sup> No entry either of the question argued, or of the decision of the committee, was made in the minutes.

<sup>‡</sup> See *post* p. 254. note (B.)

<sup>¶</sup> Writs of *alias and pluries* are issued where nothing has been done by the Sheriff, under the first writ.

<sup>‡</sup> Made 26 March 1803. See *ante* Vol. I. p. 305.

tion. The same election continues, as long as the vacancy remains unfilled. Where the first writ, and the proceedings under it, have been declared void, the second writ has relation to the original vacancy of the seat, and not to the vacancy occasioned by the avoidance of the preceding election; and should several elections be successively avoided, the case would be still the same: for it is plain that another vacancy cannot take place, till after the first has been filled up. The disqualification introduced by st. 2 G. 2. c. 24. s. 7. which for ever disables the offender from voting in any election of any Member to Parliament, has no relation to this question, being founded upon the words of a positive law, and arising from particular circumstances, *viz.* the legal conviction of the offender.

St. 2 G. 2.  
c. 24.

The principles and authorities upon which the present question is to be discussed, are for the most part to be found among cases of bribery by candidates. The disqualification of a candidate, like that of an elector, stood originally upon the ground of the common law; the statutes that were afterwards passed being intended only to give a fuller effect to what before was the law of Parliament, and an inherent principle in our constitution. In 1571, Thomas Longe was expelled the House of Commons for bribery. In 1696 the statute 7 W. 3. c. 4. was passed, disabling the offender in particular circumstances from sitting in Parliament ‘upon *such* election:’ in the year 1699 Mr. Sloane, whose former election for Thetford had been avoided for treating, was judged incapable to sit upon a second return\*. In the cases of Hindon 1777<sup>y</sup>, of Honiton 1782<sup>z</sup>, and of Kircudbright 1782<sup>a</sup>, it was determined that a candidate who had been guilty of bribery at the original election, which election had been avoided, was incapable to be returned at any election which took place in consequence of such avoidance. The cases of

\* 12 Journ. 498, 636. 13, 134, 145, 223, 225, 251. Clifford, 169, 172.

<sup>y</sup> Cliff. 185. *Ante* Vol. I. p. 376.

<sup>z</sup> Cliff. 152. 3 Lud. 165.

<sup>a</sup> 3 Lud. 466.

Southwark 1796<sup>b</sup>, and of Canterbury 1797 determined the same point with respect to treating. That of Norwich 1787<sup>c</sup>, which may be cited on the other side, can hardly be opposed to so strong a current of authorities<sup>d</sup>.

When it is considered, upon what foundation these determinations stand with respect to a candidate, it will appear, that they are equally applicable to the case of a voter. In the former cases, the construction put upon the statutory provisions, does not arise so much from the express injunction of the statute, as from the nature of the subject. The statute having declared a candidate in certain circumstances incapable to hold his seat upon his election to supply a particular vacancy, it naturally followed, that no election of that candidate, to supply that vacancy, could be valid. In like manner, the vote of a person bribed being void by common law, it follows, that his vote can never be effectual to supply the original vacancy in the House of Commons of that place, which, by reason of an undue election is still open, and which remains open, till a valid election has taken place. The able reasoning of Mr. Tierney\* in the second case of Southwark may be applied to the present question. He argues, that a candidate whose former election has been avoided for bribery, has in reality thereby suffered no punishment, if he may be returned upon a new election: so, the elector suffers nothing, who is permitted to vote at a new election, his vote having been set aside upon the avoided election. Where an election has been declared void, the votes of all the electors given thereat are, of course, annulled, whether corruptly given or not: can it therefore be said, that a voter, for whose bribery the election may have been set aside, has, at the succeeding election, the same privilege with others who have not been bribed? If so, in what does the disqualification said to be attached to bri-

<sup>b</sup> Cliff. 132.

<sup>c</sup> 3 Lud. 445.

<sup>d</sup> It is remarkable, that in the case of Aldborough 1696, Mr. Fairfax's election, in the room of Sir Mich. Wentworth deceased, having been avoided for a breach of the st. 7 W. 3. the

new writ is ordered for electing a burgess in the room of Sir M. W. deceased. See 12 Jour. 19. Clifford, 167, 213. and see the cases cited by Mr. Tierney, *ib.* 214.

<sup>e</sup> Cliff. 407, 325.

bery consist? Therefore it is submitted, that since any number of elections avoided for bribery, are to all intents and purposes void, as if they had never been holden, the disqualification of a voter for bribery continues as long as the vacancy of the seat; that is, until the vacancy, for which the first writ issued, shall have been filled up by a good and substantial election.

The counsel for Mr. Webb argued as follows:

Arg. in support of the vote.

It is denied that the voter is disqualified either by the common law of Parliament, or by statute law. The attempt now made, is a new one: no instance has been shewn where it has been made the ground of objection to a voter, that he had been bribed at a former election; much less, where his vote has been set aside for that reason. It can scarcely be doubted that cases of this sort would have occurred, if such a disqualification had been supposed to exist; for the Journals of the House of Commons present examples of bribery, in every shape, taken notice of, and punished. Some degree of suspicion, therefore, may reasonably be attached to a doctrine so new, introduced into a case of such frequent occurrence. And since it is admitted that this case must be decided by the common law, which can only be collected from the decisions, or from the general understanding, of courts of justice on former occasions, the total absence of all precedent or authority is conclusive against the position contended for on the other side.

The analogy drawn between the present case, and that of a candidate, is defective in every particular. The latter rests upon a construction put upon the positive words of an act of Parliament; from whence no assistance can be derived in the decision of a point arising from the common law. But the most material distinction, is that which results from a view of the different situations of the elector, and of the candidate. Where a candidate who has been disqualified for bribery at the first election, offers himself again upon the second, there seems to be no injustice in objecting his former offence against him, and the impolicy of permitting him, in the end, to enjoy the full benefit of the corrupt means he has made use of, is deserving of great consideration.

tion. But it must be remembered, that in such a case, the judgment of the former committee, which is produced against him upon the second trial, is the judgment in a cause to which he himself was a party, and in which he had an opportunity of being heard in his own defence. The present case is widely different. The candidate, (Mr. Webb) for whom the vote of West was given, was not a candidate at the former election, and consequently, no party to any of the proceedings thereat, or before the committee appointed to try the merits of that election: the judgment of that committee therefore, is, as to him, *res inter alios acta*, and can in no way be legally made use of to his prejudice. Further, the voter himself cannot be said to have been so far a party to those proceedings, as to be concluded by them on any future occasion. He had no opportunity of being heard in his defence to the charge made against him, or of offering evidence to repel it. It cannot therefore be reasonably contended, that the vote of this elector should be struck off from the poll of the candidate, by a sentence, against which neither the elector nor the candidate could be heard. It may have happened, that the candidate for whom the vote was given at the former election, abandoned the defence of it: he possibly might have a right to do so, as far as his own seat was concerned; but it cannot be said that he had a power, by so doing, to disqualify the voter from giving his vote for another candidate, at a future election. It is therefore submitted, that the resolution of the former committee with respect to the voter, cannot operate as a disqualification of him upon the present occasion: neither can the committee receive original evidence of the fact itself of bribery at the first election: their powers do not extend to try the merits of a former election, where Mr. Webb was not a candidate, and with which he had no concern. Those who desired to disqualify the voter upon the ground of bribery, ought to have pursued the means provided by the stat. 2 G. 2. c. 24. for that purpose, namely, a prosecution of him to conviction for his offence within two years after the commission of it. This not having been done, he stands in the same situation as any other elector, and is entitled to the same

same privileges; for it cannot be pretended that the resolution of the last committee amounts to a *lawful conviction*, within the terms of that statute.

Reply.

The counsel for Sir W. Manners, in reply.

The argument, that it would be unjust to strike off the vote of one who has not been heard in his own defence, might equally be urged against striking off any vote in the trial of a controverted election. The elector, whose vote is in question, is no party before the committee, yet it is the constant practice to decide upon his right to vote, whether the objection made to it arise from a defective title, or from some offence which he has committed. The reason for this mode of proceeding is, that the rights of all the individual electors are supposed to be defended by the candidate who represents them. There is therefore no more injustice done by this committee receiving the judgment of the former committee as evidence of the voter's crime, than was done by the first committee receiving evidence of the fact, in the voter's absence. It has been asked, by what law is the disqualification, to the extent now contended for, authorised? It is answered, that the disqualification of a voter for bribery, stands entirely upon the common law of Parliament: that the extension of it to the present case, necessarily follows from the second election being, as it were, a continuation of the first, and consequently being the very election at which the bribe has been given; the election continuing until the vacancy is filled up: and it was upon this view of the nature of the second election, that the words 'such election' in the statute of William were held to comprise every election that might take place until a legal and valid return was made.

Decision.  
That the  
voter was  
not disqualified.

The committee determined, that Ralph West was not disqualified. Mr. Plumer, upon this decision being intimated to the counsel, enquired, whether or not he might understand it to be the opinion of the committee that if the fact of bribery at the former election should be proved by original evidence, the voter would not be disqualified? The chairman answered, that such was the opinion of the committee; that they had decided the question upon general

principle.

principles; and that they could not try the merits of the former election.

Among the other cases of objected votes, no case occurred of sufficient importance to be mentioned, except that of Richard Greenland, who had been rejected at the poll, as not having a legal settlement in the borough, and whom it was proposed to add to the poll of Sir W. Manners. It was proved that he was resident in Ilchester, and that he had been duly rated in the sum of 2*d.* for his house, and 2*d.* for his stock in trade, and that he had paid those rates. It was contended, that he had gained a settlement by paying his share to the parish taxes under st. 3 & 4 W. & M. c. 11. s. 6., and that the st. 35 G. 3. c. 101. s. 4., (which enacts that no person shall gain a settlement by paying taxes for a *tenement* under 10*l.* annual value,) did not affect this case, since stock in trade could not be called a *tenement*. The counsel on the other side acquiesced in this construction of the statute, and the vote was added to the poll of Sir W. Manners.

Settlement  
gained by  
paying rates  
for stock in  
trade under  
10*l.*

The evidence of bribery, on each side, produced nothing worthy to be reported.

On the 7th of March, the committee determined, that Mr. Brooke was duly elected; that neither Sir W. Manners, Mr. Manners, nor Mr. Webb, were duly elected; and that the election of Sir W. Manners was void: that Sir W. Manners by himself and his agents, and Mr. Webb by his agents, had been guilty of bribery.

Decision and  
report.

It may be mentioned, as an incidental point in this case, that a voter was permitted to be a witness for the purpose of proving that he himself had no right to vote, being first admonished by the chairman that he was not bound to answer any question that had that tendency. No objection was made to his competency on the part of the candidate for whom he had voted.

Incidental  
points.  
Voter, a  
witness  
against his  
own vote.

An application was made on the part of Mr. Webb to the Court of King's Bench for a *habeas corpus ad testificandum* to issue to the gaoler of Ilchester gaol to bring up a witness before the committee. The Speaker, upon application, had issued his warrant to bring up the witness by the day appointed:

Prisoner  
brought up  
to give evi-  
dence.

## ELECTION CASES.

pointed: the present motion was made in order to obviate any difficulty the gaoler might make to suffer the prisoner to go out of confinement without the authority of the Court. It was said that a similar application had before been granted to bring up a prisoner to be examined before the House of Lords, upon the refusal of the gaoler to let his prisoner go without such authority. The Court granted the application, the rule having been first served upon the undersheriff, the solicitor of the Treasury, the prisoner, and a person at whose suit the prisoner was then in execution: and the applicant undertaking to pay the expences of the witness being brought up and conducted back to gaol. The prisoner was confined in gaol by virtue of a commitment for non-payment of a fine imposed upon him by the Court of K.B. for an assault. In the matter of Sir E. Price, 4 East's Rep. 587.<sup>f</sup>

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NOTE (A), from p. 239.

The reader will have observed that Mr. Webb was the last on the poll, and that Mr. Manners stood next in order to the sitting Members. If the majority in favor of Sir W. Manners had been set aside, and Mr. Webb had not been disqualified, it might have become a question, in what manner the return should be amended? The same question might also have occurred in the next case, of Aylesbury: with this difference only, that there, Mr. Bernard, who stood third on the poll, had not petitioned; whereas here, Mr. Manners had petitioned, but had abandoned his petition in the outset of the case. In the Aylesbury case, the committee refused to receive any evidence affecting Mr. Bernard. The reporter has not met with any case where a question of this kind has arisen; although probably, the Journals of the House of

<sup>f</sup> See the next case. Before the appointment of select committee it seems to have been usual for the house to procure the attendance of persons confined in gaol as witnesses, by an order to the Speaker to issue his warrants to

the Marshal, or Gaoler, and to the Serjeant at arms. See Bramber, 3 Ap. 1728, 21 Jour. 113. Flint, 23 Mar. 1736, 22 Jour. 821. Southwark, 6 May, 1769, 32 Jour. 289.



Commons contain some precedent applicable to the case. It is likely, that considerable objections would arise against receiving evidence to disqualify a candidate who was no party before the committee.

In the case of Sutherland, 1792\*, the numbers on the poll were, for General Grant, the sitting Member, 8; for Mr. M'Leod, 5; for Mr. Gordon, 3. Mr. Gordon petitioned for the seat, stating also, that Gen. Grant was ineligible. At the trial, he insisted only on a void election. After Mr. G. had petitioned, Mr. M'Leod presented a petition, claiming the seat. The committee having heard Mr. Gordon's objections to Gen. Grant's eligibility, and having decided against them, Mr. M'Leod's counsel abandoned his petition, which was decided to be frivolous and vexatious. In defence of his conduct, his counsel stated (p. 183.) "that had he not petitioned, the election might have been declared void, and Mr. M'Leod would not have obtained the seat, to which he conceived himself entitled, had Gen. Grant been declared ineligible." To this Gen. Grant's counsel replied, "that his fears were groundless, as the committee would not have declared Mr. Gordon duly elected, till they had disallowed the 5 votes of Mr. M'Leod, who should have presented a petition, disclosing the circumstances of the case, and praying to be admitted a party to defend the seat." *Quære*, as to such a mode of proceeding.

On the other hand, the express words of the statute 10 G. 3. c. 16. s. 18. authorise the committee to report only, whether the *petitioners*, or *sitting members*, or either of them, be duly elected or returned, or whether the election be void; under which authority it would seem to be incompetent for them to make a return of a candidate who had not petitioned, but who appeared from the evidence to be entitled to the seat. It may be observed however, that select committees have made no difficulty of reporting candidates to be duly elected, or to be entitled to the return, in whose favor electors have petitioned, and who have not petitioned themselves; as in the case of Colchester, 1782 †; of Downton, 1785 ‡; and of Middlesex, 1805 §.

\* Reported 2 Fraser, 158.

† 3 Lud. 166.

‡ Not reported.

§ *Post*.

## Note (B.) from p. 245.

The following is the form of the writ under which the election was holden.

George the Third, by the Grace of God, &c. Whereas Thomas Plummer and William Hunter, Esquires, were lately chosen burgeses for the borough of Ilchester in your county for the present Parliament, summoned to be holden in our city of Westminster the 31st day of August now last past, and from thence by our several writs prorogued to and until Tuesday the 16th day of November, in the 43d year of our reign, and there now holden; and whereas the lower House of our said Parliament have adjudged the election of the said Thomas Plummer and William Hunter to be void, as by the letter of our right trusty and well-beloved counsellor Charles Abbot, Speaker of our lower House of Parliament, more fully and plainly appears; by means whereof our subjects of the said borough are deprived of two burgeses to treat for the benefit of the same borough in our said Parliament; nevertheless, we being unwilling that the commonalty of our kingdom, in our said Parliament assembled to treat of the business concerning us, the state, and defence of our kingdom and the church from the aforesaid cause should be diminished or lessened, whereby those affairs may not have a due end, we command you, that in the place of the said Thomas Plummer and William Hunter, within the borough aforesaid, two other fit and discreet burgeses of the aforesaid borough, (proclamation being first made of the premises, and of the day and place), freely and indifferently, by those who shall be present at the proclamation, according to the form of the statute in that case made and provided, you cause to be elected, and the names of such burgeses to be inserted in certain indentures to be thereupon made between you and them who shall be present at such election, (whether at the said election they shall be present or absent,) and to cause them to come to the said Parliament, so that the same burgeses so to be chosen may have full power and sufficient authority for themselves and the commonalty of the aforesaid borough, to do and consent to those things which in our Parliament aforesaid by the common council of our realm (by the blessing of God) shall happen to be ordained upon the aforesaid affairs, willing nevertheless, that neither you, nor any other sheriff of this our kingdom in any wise be elected; and the elec-

tion so made distinctly and openly under your seal and the seals of them who shall be present at such election, certify you to us in our Chancery forthwith, remitting to us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness ourselves at Westminster, the 30th day of March, in the 43d year of our reign.

**BATHURST and BATHURST.**

To the sheriff of the county of Somerset. A writ for a new election of two burgesses for the borough of Ilchester.

**BATHURST and BATHURST.**

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**CASE XXXIX.**

**THE BOROUGH OF MALDEN IN THE COUNTY OF ESSEX.**

**THIS** was a petition of certain electors against the election of Mr. Strutt and Mr. Western, presented 6 Dec. 1802; renewed, 28 Nov. 1803. The petitioners brought forward no evidence in support of their petition, which was determined by the committee to be frivolous and vexatious; and the sitting Members were reported to be duly elected, 16 Feb. 1804.

## CASE XL.

THE BOROUGH OF HONITON, IN THE COUNTY OF  
DEVON.

**N**O evidence was produced in support of this petition<sup>a</sup>,  
(of electors) and the sitting Members, Sir John  
Honywood and Mr. Shum, were reported, 29 Feb. 1804,  
to be duly elected.

<sup>a</sup> Presented, 6th December, 1802, renewed, 28th November 1803.

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## CASE XLI.

THE COUNTY OF THE TOWN OF CARRICKFERGUS.

**M**R. Ezekiel Davys Wilson, produced no evidence in  
support of his petition<sup>a</sup>; and the sitting Member  
Lord Spencer Chichester was reported (23 Feb. 1804,) to  
be duly elected.

<sup>a</sup> Presented, 6th December 1802, renewed, 28th November 1803.

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## CASE XLII.

THE BOROUGH OF SUDBURY, IN THE COUNTY OF  
SUFFOLK.

**I**N this case the petitioners (freemen,) produced no evi-  
dence in support of their petition<sup>a</sup>, and the sitting  
Member, Mr. Pytches, was reported to be duly elected, 23  
February, 1804.

<sup>a</sup> Presented, 7th December, 1802, renewed, 28th November 1803.

## CASE XLIII.

THE BOROUGH OF MINEHEAD, IN THE COUNTY OF  
SOMERSET.

IN this case the petitioners, (Mr. Langston and Mr. Woodbridge) produced no evidence in support of their petition<sup>a</sup>, and the sitting Members, Mr. Luttrell and Mr. Patteson were reported to be duly elected, 24 Feb. 1804.

<sup>a</sup> Presented, 7th December, 1802, renewed, 28th November 1803.

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## CASE XLIV.

THE CITY OF HEREFORD.

THE petitioners (freemen,) produced no evidence in support of their petition<sup>a</sup>. The sitting Members (Mr. Scudamore and Mr. Symonds,) were declared to be duly elected, and at the instance of their counsel, the petition was resolved to be frivolous and vexatious, 28 Feb. 1804.

<sup>a</sup> Presented, 7th December, 1802, renewed, 28th November 1803.

## CASE XLV.

## THE BOROUGH OF AYLESBURY, IN THE COUNTY OF BUCKS.

The Committee was appointed on the 24th February 1804, and consisted of the following Members :

Sir George Cornwall, Bart. <i>Chairman</i> .	Sir Hugh Inglis, Bart.
Sir John Dashwood King, Bart.	John Buller, Esq.
Sir W. Lemon, Bart.	Lord Ossulston.
Gabriel Tucker Steward, Esq.	Edward Berkeley Portman, Esq.
Francis John Browne, Esq.	Sir Martin B. Folkes,
John Smith, of Wendover, Esq.	Bart.
John Hammet, Esq.	Cha. W. Williams
Sir Jacob H. Astley, Bart.	Wynn, Esq.
Pascoe Grenfell, Esq.	

} chosen by  
the first 13<sup>th</sup>.

Petitioners. 1. Thomas Francis Fremantle, Esq. 2. Electors.

Sitting Members: James Dupré, Esq. Robert Bent, Esq.

Counsel for the petitioning candidates: Mr. Plumer, Mr. Gafcles.

For the electors: Mr. Dayrell.

for Mr. Bent: Mr. Adam; Mr. Clifford.

for Mr. Dupré: Mr. Serjt. Runnington; Mr. Conft; in the absence of either, Mr. Stracey.

**Petitioners.**

**M**R. Fremantle alleged in his petition<sup>b</sup>, that the candidates were Mr. Bent, Mr. Dupré, Mr. Bernard, and himself: that the returning officers had admitted divers disqualified persons to vote for Mr. Bent and Mr. Dupré, and had rejected several legal electors who tendered their votes in favor of the petitioner: that Mr. Dupré had been guilty of bribery, and of treating; and that Mr. Bent had also been guilty of the same offences: that by these, and other unlawful means, the two sitting Members had obtained a colorable majority over the petitioner, who had the greatest number of legal votes, and ought to have been returned<sup>c</sup>.

<sup>a</sup> There being more than two parties      newed, 28th Nov. 1803.  
See ft. 11 G. 3. c. 42. f. 6.

<sup>b</sup> Presented, 6th Dec. 1803, re-

<sup>c</sup> See the last case, note (A.)

The petition<sup>d</sup> of the electors contained a similar claim to the seat in favor of Mr. Fremantle: and a charge against the sitting Members, of bribery and treating.

There was no dispute as to the right of election; it was admitted to be in the "householders of the borough, not receiving alms<sup>e</sup>." The numbers on the poll were, for Mr. Dupré 336: for Mr. Bent, 271: Mr. Bernard 180; Mr. Fremantle, 34. It was proposed on the part of the latter gentleman, to affect so many of the voters for the other candidates with bribery, as to leave him the majority: the evidence however, was almost exclusively directed against Mr. Bent, and the voters in his interest; as to whom it was proved that he had been recommended to the electors by certain persons, one of whom was a banker at Aylesbury, as a candidate who would give each elector ten guineas for his vote; and that a public distribution of two guineas each to many of the voters, had taken place in February 1802. That Mr. Bent, before that time, was a stranger in the borough; and that he had agreed to lodge the sum of 3000*l* in the bank of the person abovementioned, for the purposes of his election. Similar public distributions were also made on the behalf of Mr. Dupré, and Mr. Bernard.

Right of election.

From the resolutions reported by the committee to the house, it will appear, that in their opinion, Mr. Bent's

<sup>d</sup> Presented, 6th of Dec. 1802; renewed, Nov. 28th 1803.

<sup>e</sup> Determined 28 Jan. 1695-6. 11 Jour. 419. The Parliamentary History of this borough is curious. It was incorporated 1553, 4 Mar. by the name of the bailiff, aldermen, and burgesses of the borough of Aylesbury; these were empowered by that charter to choose two Members of Parliament. They made the first return that same year. Dr. Brady has inserted (App. p. 50.) two returns, 14 and 28 El. the former made by Dame Dorothy Packington, widow, late wife of Sir J. F. Knight, Lord and Owner of the town of Aylesbury; the latter, by John Packington, Esq. and the commonalty of the

same borough: and Dr. Willis writes, that a return similar to the last was made, 29 Eliz. The same author relates, that the returns were afterwards made by the bailiff and burgesses, till 3 Car. 1. when it was made by the inhabitants and burgesses. Mr. Carew is of opinion, that the corporation was dissolved prior to 14 Eliz. If so, the name of the corporate presiding officer, continued in the returns long after the office had ceased to exist. The constables are now the returning officers, and the householders, by st. 44 G. 3. c. 50. enjoy the right of election, in common with the freeholders (of the annual value of 40*s*.) of the three hundreds of Aylesbury.

connexion with the persons by whom the money was distributed was sufficiently proved. The evidence of bribery was brought home to a considerable number of voters, but the counsel for the petitioners acknowledged that they had not specifically proved the receipt of a bribe, by a sufficient number of them, individually, to reduce Mr. Bent's majority to a minority. But from the general and unreserved distributions that had taken place, the counsel for the petitioners desired the committee to infer, that by far the greater part of these electors were disqualified, and to seat Mr. Fremantle. The counsel for Mr. Dupré made but a very short address to the committee, as they did not consider him affected by any part of the evidence. The defence of Mr. Bent rested entirely in observation upon the character of the witnesses for the petitioners, and in contending, that no evidence had been given of his being concerned in any positive act of bribery in the borough: they admitted that it had been proved, that he had agreed to pay the sum of 300*l.* for a seat in Parliament; but they said, that this agreement had not been made with the electors, but with persons who might be called brokers for the seat: that Mr. Bent was not affected by the means which they might have used to procure him his return; and that the payment of a sum of money for a seat in Parliament was not a crime, provided that it did not appear that the money had been paid to the electors for their votes.

Decision  
and report.

The Committee determined,  
That Mr. Dupré was duly elected: that neither Mr. Bent nor Mr. Fremantle were duly elected; and that the election as to one burghers, was void.

Special report.

They also resolved, and reported to the house,  
‘ That it appears to this committee, that at the last election for the borough of Aylesbury, in the county of Buckingham, Robert Bent, Esq. was by his agents, guilty of bribery.

‘ That it appears to this committee, that such a notorious system of corruption was formed, and such instances of individual acts of bribery were committed, previous to the said election, with a view to influence the same, as to  
render



render it incumbent on the committee, to submit the same to the most serious consideration of the house, in order that such proceedings may be instituted thereon, as the house in its wisdom may think proper to adopt.

‘ That it appears to this committee, that certain persons, (naming them) were severally and respectively engaged in the said system of corruption.’

Incidental points.

The first witness having said, in his cross-examination, that he had been invited upon some occasion to meet Mr. Bernard's friends, and his answer tending to shew a distribution of money on the part of Mr. Bernard, it was suggested, that that gentleman being no party before the committee, either as a petitioner, or a person complained of, no evidence affecting him should be received; and the committee accordingly ordered the answer of the witness to be struck out, as far as it concerned Mr. Bernard.

No evidence received against an unsuccessful candidate, who does not petition.

A witness being called to give an account of what passed at a meeting held in Mr. Bent's absence by certain electors, relative to bringing down Mr. Bent, as a third candidate, to oppose Mr. Dupré and Mr. Bernard, stated, that the conversation was begun by a Mr. D. The counsel for Mr. Bent interrupted him, and objected to any evidence being given of what Mr. D. had said, unless his connexion with Mr. Bent was first proved. The committee, after argument, determined that the evidence might be given, for the purpose only of disqualifying individual voters. The witness proceeded to say, that an offer was made on the part of Mr. Bent, by a certain person present whom he named, for the payment of the sum of 3000*l.* to the electors: the witness was again stopped, and a second argument arose; the committee decided that the line of examination might be proceeded in, but that it was to be understood that Mr. Bent, although his name were so mentioned, would not be criminally affected by it.

Proof of bribery to affect individual voters.

A witness who had stated that he had been present at the distribution of some money, was asked, in whose name, and on whose account, that distribution had taken place? He answered, that he did not know. He was then asked

Witness examined as to his belief of a fact.

asked for whom *he believed* the distribution to have been made? the question was objected to, as being only the result of the witness's judgment, upon certain facts which must have come within his knowledge, in order to enable him to form it: those facts, and not the judgment of the witness ought to be given in evidence. It was answered that it was very common to ask a witness his belief, and then to require him to state the grounds of it: that the degrees of knowledge were various, from absolute certainty, to mere belief, and doubt; that a witness was bound to state upon his oath as much what he believed, as what he certainly knew, leaving it to the court, to affix that weight to his evidence, which the accuracy of his memory and the positiveness of his knowledge required: that at the trial of Lord Thanet, Mr. Sheridan disclaimed all knowledge of an intent to rescue Mr. O'Connor: the question being asked him, whether or not he believed such an intent to have existed, it was objected to: but Lord Kenyon told him that he *must* answer it. And although that question was put to him in his cross-examination, and in the present case it was proposed as a part of the examination in chief, yet that made no difference; for if it was inadmissible, it would be equally so, in either case. In reply, it was said that the question might be more allowable in cross-examination, as it might tend to try the credit of a witness; and that in Lord Thanet's case, the question was asked to shew a general disposition in certain of the by-standers to effect a crime, and not to fix it upon any individual, as in this case.

The committee decided, that the question might be put.

Exclusion of  
witnesses.

Feb. 23. On the 9th day of the sitting of the committee, Peter Moore, Esq. the Member for Coventry, was called as a witness on the part of the petitioners. Mr. Plumer in his opening for the petitioners had generally stated Mr. Moore to have been a confidential friend, and adviser of Mr. Bent, respecting his transactions at Aylesbury, but had named none particularly, in which he had borne a part. Mr. Moore had attended in the committee-room on the first six days. On the second, it had been jestingly observed to him by one  
of

of the petitioners' counsel, that he might possibly be wanted as a witness: but no further notice was taken of this; and it was admitted, that nothing serious was intended. On the 6th, from the examination of one Cole it appeared that Mr. Moore had been a witness to an agreement entered into between Mr. Bent and certain persons on the part of the voters at Aylesbury, for the lodging a sum of money in the bank there; on that same day, he was informed he would be called as a witness; from which time he had abstained from entering the room. A notice had from the first been affixed to the door in the usual form, that witnesses were not to be admitted till called for, otherwise they could not be examined: this had not been formally resolved by the committee; but had been notified by the chairman, at the commencement of the trial.

It was at first suggested, as an objection to this gentleman's evidence, that he had been confidentially entrusted by Mr. Bent with all matters respecting his election: but this ground was immediately abandoned.

Secondly, it was insisted that he could not now be examined, having been in the room during the examination of other witnesses: and that the rule as laid down by Lord Glenbervie, 1 vol. p. 61. was invariable, viz. "that when a witness is under examination, all those who are intended to be called afterwards on either side are directed to withdraw; after which, if they remain in the committee room, their evidence will not be received."

On the part of the petitioners, after the importance of Mr. Moore's being examined had been observed upon, who, as it now appeared, was in possession of the most material part of the evidence, it was contended, that the rule by which it was attempted to exclude his testimony, was a rule of convenience, which any committee might or might not adopt, and which, if adopted, might be dispensed with, if there appeared sufficient cause. It could hardly be said to have been adopted by this committee in so positive a manner, as to impose upon them a necessity to observe it on the present occasion. Moreover, it was a rule founded on  
a due

Argument  
for the peti-  
tioners.

*Quere.*

a due regard to the interest of the party to whom the witness might be adverse; lest, being aware of what already had been given in evidence, he might shape his testimony in such a manner, as might best suit his friends. It was plain that this witness was the friend of the sitting member; he had attempted to avail himself, in the first instance, of his intimate connexion with him, to excuse himself from giving his evidence; therefore no reasonable objection could be made on the part of the sitting member, on the ground of Mr. Moore's having been in the room; for the consequence, if any, would be favourable to him. With respect to the exclusion of witnesses in ordinary courts of justice; if a witness entered the court, after having been directed to withdraw, it was the better opinion, that although he might be punished for the contempt, he must be suffered to give his evidence. In this case, however, it would be extremely hard to apply the rule; for it was impossible for the petitioners to know that Mr. Moore's evidence would be required, till it appeared from the testimony of Cole (who was also an adverse witness) that it would be of the utmost importance. Circumstances might frequently happen in the course of the trial of a petition, which might make it necessary to call witnesses, and produce evidence, the necessity of which could not be foreseen at the commencement of it. Could it be said, that if these witnesses should appear to have attended at the previous stages of the proceeding, their testimony was inadmissible? The contrary had been decided in the case of Southwark 1796<sup>d</sup>. "Thomas Andrews was called on the eighth day. He had been in the committee room during the examination of several of the witnesses on the four first days; he was not summoned till the fourth day, and did not know till then that he was to be a witness. Since he was summoned, he had not been in the committee-room, nor heard any witness examined." The committee in that case decided, that under those peculiar circumstances, he might be examined. That case was

<sup>d</sup> Clifford, 108.

stronger than the present, because it did not appear there, that the witness had any connexion with the sitting member. Lastly it was contended that Mr. Moore, being a member of Parliament, the committee had no authority to require him to withdraw; and therefore, that he was not within the operation of the rule.

In reply to the last observation, it was denied that a member of the House of Commons (not a member of the committee) had any more right to enter into, or remain in a select committee-room, than any other person: it was a court of justice established by act of Parliament, and open for all his Majesty's subjects, equally. In answer to the other arguments for the petitioners, it was said, 1. that the rule had been publicly affixed to the door of the room, so that no person could pretend to be ignorant of it: 2. that the rule, if it once ceased to be universal, was no longer any rule at all; for then it might be easily evaded by persons whose interest it might be so to do: that it had in general been so strictly observed, that even the agent of the adverse party had never been permitted to be examined, if he had remained in the room, unless his name had been regularly given in to the committee. It had been adopted in the cases of Cardigan<sup>s</sup> and Worcester<sup>h</sup> 1776, and by all the committees which had sat since that time. The distinction between friendly and hostile witnesses could only be seen by adverting to the parties by whom they were produced: any supposed ties of friendship, or bias in the mind of a witness, could afford no rule for a court of justice to proceed upon.

With respect to the case of Andrews, it was said to be a solitary instance of the rule having been dispensed with: the authority of it might therefore justly be questioned; but admitting it to have been rightly decided, it did not apply to the present case: for it was not at all known that Andrews would ever be wanted as a witness; whereas the connexion of Mr. Moore with Mr. Bent had been stated in the opening

<sup>s</sup> 3 Ld. Gl. 226.

<sup>h</sup> 3 Ld. Gl. 265.

of the petitioners' case: therefore it was the laches of the petitioners themselves, which had caused the accident of which they complained; for, from the knowledge of that connexion, they should have collected the necessity of producing Mr. Moore as a witness, and not from the accidental discovery of a particular fact, transpiring from the examination of another person. The committee determined, "that Mr. Moore could not be examined<sup>1</sup>."

Exclusion  
of witnesses.

It was also determined by this committee, that a witness of the name of Peck, who had been served with a summons during the course of the trial, and who had been in the room before the service of the summons, could not be examined; although the only purpose of his being called was to account for some money, proved by the evidence of a former witness (the banker of the opposite party) to have been paid to him.

Witness  
committed  
for prevari-  
cation.

24 Feb. The committee reported that a witness had been guilty of gross prevarication: and that the committee had, according to the powers given them by ft. 28 G. 3. c. 52. f. 16. committed him to the custody of the Serjeant at Arms. He was ordered to be committed to Newgate, and was reprimanded and discharged, 14 March.

Proceedings  
in Parlia-  
ment.

29 Feb. The report was made to the House, and it was ordered to be printed, together with the minutes of the proceedings of the committee. It was also ordered that the Speaker should not issue his warrant for a new writ, till the report should have been considered. Leave was given (23 Mar.) to bring in a bill for the prevention of bribery and corruption in the election of members to serve for this borough; which passed the House of Commons 8 May: the House of Lords 22 June: and received the royal assent 29 June. The issuing of the warrant for a new writ had been delayed by successive orders, till 2 July. The statute (44 G. 3. c. 60.) enacts, that persons having a freehold worth in the three hundreds of Aylesbury of the yearly value of 40s. may vote at elections for Aylesbury. 2. That the right

St. 44 G. 3.  
c. 60.

<sup>1</sup> Gloucestersh. 16. Middlesex, *ante*, p. 135. Clifford, p. 167.

of election shall be in such freeholders, and persons having a right by the custom of the borough to vote. 3. That freeholders before voting shall take a certain oath. 4. The penalty for perjury. 5. That the proper officer shall indorse on the writ the day of his receiving it, and shall give notice of the election as is thereby required. 6. That the act shall be read before every election.

## CASE XLVI.

## THE CITY OF LONDON.

The Committee was appointed on the 29th of February, 1804, and consisted of the following Members :

John Fane, Esq. *Chairman*.  
 John Lemon, Esq.  
 Lord Templetown.  
 James Adams, Esq.  
 Edward Golding, Esq.  
 William Gore Langton, Esq.  
 Henry Howard, Esq.  
 Lord Huntingfield.  
 George Shum, Esq.

W. A. Madocks, Esq.  
 James Langham, Esq.  
 Cha. M. Ormsby, Esq.  
 Thomas Fyde, Esq.  
 Edward Hilbard, Esq. for the  
 petitioner,  
 William Baldwin, Esq. for the  
 sitting Members,

} *Nominees.*

Petitioner, Sir Watkin Lewes, Knight.  
 Sitting Members, Sir William Curtis, Bart.  
 Sir John William Anderson, Bart.  
 Harvey Christian Combe, Esq.  
 Charles Price, Esq.

Counsel for the Petitioner : Mr. Williams.

for the Sitting Members : Mr. Adam, Mr. Common Serjeant,  
 (Mr. Knowlys.)

for the Sheriffs : Mr. Plumer.

Petition,

THE petitioner<sup>a</sup> complained of the illegal conduct of the returning officers in reducing the number of poll-clerks on the sixth day of the election from six to one; whereby great confusion was created, and a number of livery-men were prevented from voting, who would have given their votes for the petitioner, and thereby turned the majority in his favor: and that the electors had been deceived by one of the agents for the returning officers, who informed them, during the time that the poll was open, and while several electors were

<sup>a</sup> The petition was presented 7th Dec. 1802, renewed, 28th Nov. 1803.



at the hustings for the purpose of voting for the petitioner, that the election was over : and further, " that some person or persons, to the petitioner unknown, did, in order to prevent the petitioner from personally attending at the hustings, and otherwise exerting himself in bringing forward the liverymen of the City, who were desirous of returning the petitioner as their representative to serve in the said Parliament, prevail upon a man who had a legal demand on the petitioner, (but which demand had shortly then before been settled, by giving him a security for the amount to his own satisfaction,) to cause the petitioner to be arrested and detained in custody ; and, by means of the petitioner's absence during Friday, the 9th of July" (the fourth day of poll,) "the other candidates had opportunities of bringing forward the voters in their favour, and thereby at the close of the poll on that day, the four persons returned as members to serve for the said city, had a considerable majority over the petitioner."

Arrest of a  
candidate.

The right of election for the City of London, is in the Livery-men.

Right of  
election.

The elections there are regulated by st. 11 G. 1. c. 18 : by s. 4., when a poll is demanded, the presiding officer is required to finish it within seven days. By s. 14, persons are excluded from voting, who have not been upon the livery 12 calendar months before the election and who have not paid their fines, &c. and who have, at any time within two years before the election, requested to be, and accordingly have been, discharged from paying to the rates and taxes to which the citizens of London, inhabiting therein, are or shall be liable<sup>b</sup>, or who shall have received alms within that time.

St. 11 G. 1.  
c. 18.

The evidence produced in support of the allegations contained in this petition entirely failed in establishing any partiality or neglect of duty in the returning officers ; nor did it appear that any prejudice had resulted to the petitioner from the number of poll-clerks being diminished : or that his arrest during the election was either malicious and unfounded, or procured by any person interested in opposing

Evidence.

<sup>b</sup> See *ante*, Vol. I. p. 108. 507, 8.

Candidate  
not free from  
arrest during  
his attend-  
ance on the  
poll.

his success. His counsel contended for a void election, and finally rested his case upon the privilege, which was said by him to belong to every candidate during an election, to go to and return from the hustings, without arrest by civil process; this privilege was said to be founded both upon the principle of law which protects all persons whose affairs require their attendance at a court of record; and upon the analogy to a privilege which was said to be allowed to members after the dissolution of a Parliament, and which protected their persons for a certain time, in order to enable them to make their canvas for their re-election. No case or authority upon this subject, was cited. It appeared that Sir W. L. had been arrested for 880*l.* as he returned from the hustings, after the close of the poll, on the fourth day.

2 Str. 935.

Decision  
and report.

The committee, on the 3d of March, determined, that the sitting Members were duly elected, and that the petition was frivolous and vexatious.

Incidental  
points.

The following incidental points occurred during this trial.

Production  
of the poll-  
books.

The returning officers (the sheriffs at the time of the election,) and their under-sheriff, had been served with a notice, and an order to attend, and to produce the poll. The counsel for the sitting Members objected, that the notice and order should have been directed to the sheriffs, who were so at the time of the trial, and who had the legal custody of the poll-books. But the committee decided that the under-sheriff, (who had the poll-books in court) should produce them<sup>a</sup>.

The

<sup>a</sup> See *ante*, case of Herefordshire, Vol. I. p. 208. In the case of Yorkshire, 24th Feb. 1735, (22 Journ. 587,) it was objected against the production of the poll-books by the deputy clerk of the peace, that the same had not been delivered over upon oath, and not within the time limited by law: and no proof having been given, that no alterations had been made therein, after the said election, and before the said deliv-

ery: reference was made to the preamble of st. 10 Ann. c. 23. and to sect. 5: and to the case of Bucks, 12 March 1727; and the deputy clerk of the peace being further examined, it was resolved, "that books, called the original poll books of the last election, &c., produced by R. A. deputy-clerk of the peace for the east-riding of the said county, and which were delivered over to him, by the high sheriff of the said

The petitioner being a prisoner for debt in the Fleet prison, at the time of the trial of his petition, the chairman, on the application of his counsel, issued a warrant to him to attend in person before the committee<sup>d</sup>.

Order for the  
petitioner's  
attendance  
from prison.

The counsel for the petitioner proposed to prove that the returning officers had continued the poll open only six hours, instead of seven, as required by st. 25 G. 3. c. 84. s. 3. and he contended that the particular statute, 11 G. 1. c. 18. being silent as to the duration of the poll for each day, it fell within the general direction of the statute of G. 3. The counsel for the sitting Members denied that any part of the st. 25 G. 3. c. 84. extended to elections in the city of London, which remained exclusively subject to the regulations of the st. 11 G. 1. They also contended, that, should the committee be of opinion, that the st. 25 G. 3. applied to the present question, the neglect to comply with that *directory* clause, would not afford a ground to avoid the election, unless some particular mischief could be shewn to have resulted from it: and they cited a MS note of the case of Colchester, 1789\*. They further insisted, that the petitioner was not entitled to avail himself of this matter, not having stated it in his petition. The petitioner stated

Petitioner  
confined to  
his petition.  
St. 25 G. 3.  
c. 84. See  
s. 9.

Directory  
statute.

said County, in open court, at the quarter-sessions of the peace for the said riding, about two months after the said election, as the original poll taken at the said election, and which have been kept by him, the said deputy clerk of the peace, ever since, among the records of the sessions of the peace for the said riding, the said books not being delivered over by the said sheriff within the time, nor upon oath, as required by the act of the 10th year of the reign of the late queen, for the more effectual preventing fraudulent conveyances, in order to multiply votes for electing Knights of shires to serve in Parliament, be admitted in evidence: In the case of Bucks, 12 Mar. 1727, the clerk of the peace being called as the first witness for the petitioner, produced

18 paper books, which he said were delivered to him by the under-sheriff, as the poll-books taken at the election, that they were taken at different places, some by the sheriff's agents, and others by agents for the candidates; but he could not distinguish, or say, which of them made the sheriff's poll. And none of the said books being either sworn to by the sheriff, or attested by him, the committee did not think, they had sufficient evidence to proceed upon; and resolved that the sitting Member was duly elected; and the House negatived a motion made to re-commit their resolutions." 21 Journ. 80.

<sup>d</sup> See *ante*, p. 136.

\* *Ante*, vol. 1. 506, and see *ib.* 430.  
3 Lud. 3. 1 Fra. 377. *ante*, vol. 1. 43.

“ that the poll commenced again at nine o'clock in the mornings of Wednesday the 7th of July, and of Thursday the 8th, and Friday the 9th of the same July 1802, and closed on each of those days at the hour of three o'clock in the afternoon of the said respective days;” but no complaint was made that the time was shorter than is allowed by law. It was said that this statement was matter of recital only and not of complaint, and could not have been meant to be understood as a ground of charge against the returning officers: and the case of *Petersfield 1775<sup>f</sup>* was cited, where the petitioner was restrained from giving evidence (as the ground of setting aside the election) that the sitting Member was sheriff of the county, at the time of his election; there being no express allegation to that effect in the petition; although in the introductory part of the petition, it was stated that Sir A. H. Bart. *High-Sheriff for the county of H.* had been a candidate at the election, &c. It was answered, on the part of the petitioner, as to the last objection, that in the present case there was an express allegation that the poll commenced at nine and closed at three; and that although no specific complaint had been made against the returning officer on this account, nor was it alleged that the election was therefore void, yet these were only conclusions to be drawn from the fact stated, from which, if true, it clearly appeared that the 25 G. 3. had been disobeyed: that the concluding words of the petition “ *therefore praying the House to give such orders touching the premises as shall be deemed right, and according to the rules of the House, so that a proper return may be made of Members to serve in the present Parliament for the said city,*” referred to the whole antecedent part of the petition, and might be connected with any matter of fact therein stated: and the case of *Cricklade 1776<sup>g</sup>* was cited, where the petitioners were permitted to enter into the proof of bribery by the sitting Member, it being comprehended in the words *corrupt practices* alleged in the petition.

<sup>f</sup> 3 Ld. Gl. 3.

<sup>g</sup> 4 Ld. Gl. 55.

The committee determined, that the counsel for the petitioner should not give evidence of the number of hours spent each day in polling, that not being stated as matter of complaint in the petition <sup>h</sup>.

<sup>h</sup> See the case of Caermarthenshire, *ante*, vol. 1. p. 289; and the authorities referred to in the note. In the case of Sudbury 1770, 32 Journ. 43,705, the petitioning candidate complained that the sitting Members had procured themselves to be returned by means of bribery and other undue and illegal practices; the electors in his interest complained that they had been guilty of bribery, &c. and that by means of these and other corrupt, undue, and illegal practices, they did influence and procure a majority of votes, although the greatest part of such votes were illegal, and ought not to have been taken; the House resolved, that the petitioners should

not be permitted to prove that many of the persons who voted for the sitting Members, were not legally entitled to vote, 'there being no allegation in either of the petitions, to warrant their producing such evidence.' Northampton, 1769. 32 Journ. 55, 183. Mr. Howe complained that the returning officers, from the commencement of the canvass, gave notorious and repeated proofs of their attachment to the sitting Members: The House permitted the petitioners under this allegation, to give evidence of their partiality and attachment to the sitting Members, before Mr. Howe became a candidate for the borough.

## C A S E XLVII.

### THE CITY OF COVENTRY.

A Petition was presented by certain electors against the election of Mr. Moore <sup>a</sup>: no evidence being brought to support the allegations thereof, Mr. Moore was reported to be duly elected, 3 Mar. 1804.

<sup>a</sup> Presented 19 Ap., renewed, 28 Nov. 1803. The Committee was appointed, 2 Mar. 1804.

## CASE XLVIII.

THE BOROUGH OF ILCHESTER IN THE COUNTY OF  
SOMERSET.

**I**N consequence of the election of Sir W. Manners having been declared void,<sup>a</sup> another election was held, and Mr. John Manners was returned. Mr. Ogle petitioned against his return, 29 Mar. 1804,<sup>b</sup> and a motion having been negatived for discharging the order for taking the petition into consideration, (13 Apr.) the committee was appointed 20 Apr. On the 23d, they reported the sitting member to be duly elected, and the petition to be frivolous and vexatious. The counsel for the sitting member admitted that a notice had been given to him of the petitioner's intention not to give evidence in support of his petition; and left it to the committee to decide as they should think proper upon this question.

<sup>a</sup> See ante, p. 251.

<sup>b</sup> Presented, 29th Mar. 1804.

# CASE XLIX.

## THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 26th of April 1804, and consisted of the following Members:

Rt. Hon. Wm. Windham, <i>Chairman</i> .	Sir Matth. Bloxam, <i>Knt.</i>	} <i>Nominees.</i>
Rich. Gervas Ker, <i>Esq.</i>	Hon. Cha. Kinnaird.	
Ja. Martin Lloyd, <i>Esq.</i>	Cha. M. Ormsby, <i>Esq.</i>	
Jos. Holden Strutt, <i>Esq.</i>	Robt. Holt Leigh, <i>Esq.</i>	
Hen. Jodrell, <i>Esq.</i>	Hon. Cha. Ja. Fox, for the peti-	
John Prinssep, <i>Esq.</i>	tioners to oppose the right re-	
Sir Rob. Barclay, <i>Bart.</i>	ported in 1803.	
Wm. Loftus.	Wm. Sturges Bourne, <i>Esq.</i> for	} <i>Nominees.</i>
Matth. Russell, <i>Esq.</i>	the petitioners to defend that	
	right.	

Petitioners against the right reported } 1. Samuel Mitchell, and others.  
by the last committee: } 2. Joseph Childs.

Petitioners to defend the right: Hon. Wm. Eliot, and others.

Counsel for Mr. Mitchell and others: Mr. Piggott; Mr. Adam; in the  
absence of either, Mr. Serjt. Runnington.

for Mr. Childs: Mr. Pell.

for Mr. Eliot, and others: Mr. Plumer; Mr. Serjt. Lens; in  
the absence of either, Mr. Hobhouse.

THIS was a petition of appeal under st. 28 G. 3. c. 52. f. 26<sup>a</sup> against the right of election determined by the select committee in 1803, and reported by them to the House, Petition of appeal.

<sup>a</sup> St. 28 G. 3. c. 52. f. 26. And be it enacted, That it shall and may be lawful for any person or persons at any time within twelve calendar months after the day on which such report shall have been made to the House, or within fourteen days after the day of the commencement of the next Session of Parliament, after that in which such report shall have been made to the House, to petition the House to be ad-

mitted as a party or parties to oppose that right of election, or of choosing, nominating, or appointing the returning officer, or returning officers, who is or are to make return of such election, which shall have been deemed valid in the judgment of such committee.

S. 27. And be it enacted, That if no such petition shall be so presented within the time above limited for presenting the

House, 10 Mar. in that year. See the case reported, vol. i. p. 110.

Petition to  
oppose the  
right re-  
ported.

The petition of Samuel Mitchell and others<sup>b</sup>, stated the election to have been held 6 July 1802; that the Hon. John Eliot, and the Hon. W. Eliot had been returned at that election; and that Mr. Sheridan and Mr. Ogilvie, the unsuccessful candidates, and also certain electors, had petitioned against their return; that the committee appointed to try the merits of the election, required the parties to deliver in statements of the rights of election for which they

the same, the said judgment of such committee on such question or questions, shall be held and taken to be final and conclusive in all subsequent elections of Members of Parliament for that place, to which the same shall relate, and to all intents and purposes whatsoever; any usage to the contrary notwithstanding

S. 28. And be it enacted, That whenever any such petition shall be so presented, a day and hour shall be appointed by the House, for taking the same into consideration; so that the space of forty days at the least shall always intervene between the day of presenting such petition, and the day appointed by the House for taking the same into consideration; and notice of such day and hour shall be inserted, by order of the Speaker, in the next London Gazette, and shall also be sent by him to the Sheriff, or other returning officer for the place to which such petition shall relate; and a true copy of such notice shall by the said Sheriff or other returning officer, be forthwith affixed to the doors of the County-hall, or Town-hall, or of the Parish Church nearest to the place where such election has usually been held.

S. 29. And be it enacted, That it shall and may be lawful for any person or persons, at any time before the day so appointed for taking such petition into consideration, to petition the House to

be admitted as a party or parties to defend such right of election, or of choosing, nominating, or appointing the returning officer, or returning officers; and such person or persons shall thereupon be so admitted, and shall be considered as such to all intents and purposes whatever.

S. 30. And be it enacted, That at the hour appointed by the House for taking such petition into such consideration, the House shall proceed to appoint a select committee to try the merits thereof, according to the directions of the above recited acts, and of this act; and such select committee shall be sworn to try and determine the merits of such petition, so far as the same relate to any question or questions respecting the right of election, for the place to which the petition shall relate, or respecting the right of appointing, nominating, or choosing the returning officer, or returning officers, who are to make return of such election; and the determination of such committee on such question or questions, shall be entered on the journals of the House, and shall be held and taken to be final and conclusive in all subsequent elections of Members of Parliament for that place, to which the same shall relate, and to all intents and purposes whatever, any usage to the contrary notwithstanding.

<sup>b</sup> Presented 20th Dec. 1803.



respectively contended: and finally, that they determined, and reported to the House, that the right was not in the inhabitants paying or liable to pay scot and lot, but in the mayor and burgesses of the borough: the petitioners therefore, being advised that the said resolutions and determination of the said select committee of the House, on the said right of election, was contrary to law, prayed that they might be admitted as parties to oppose that right of election which had been deemed valid in the judgment of the said committee as aforesaid, and to support and establish the said right of election contended for by the petitioners before the said select committee, and which was negatived by the said select committee of the House, or such other right as should be consistent with law, and that such relief might be granted as the justice of the case might require.

The petitioner Mr. Joseph Childs, after reciting the former proceedings, stated, that he humbly conceived, that the right of election determined by the last committee was not the right of election for the borough, but that the right set forth in the statement of Mr. Sheridan and Mr. Ogilvie, was the legal right: and therefore prayed the House to admit him as a party to oppose that right of election, that had been deemed valid in the judgment of the said select committee, &c.

The petition of the<sup>d</sup> Hon. William Eliot and others, after stating in like manner the determination of the former committee upon the right of election, and referring to the petitions abovementioned against that determination; stated, that "they were advised, and humbly contended, that the right of election of burgesses to serve in parliament for the said borough was in the mayor and burgesses of the said borough, according to the determination of the said select committee; and therefore prayed the House, that they might be admitted parties to defend and support the right of election that had been deemed valid in the judgment of the said select committee as aforesaid, and to oppose the right of election for which the said other petitioners contended be-

Petition to  
defend the  
right report-  
ed.

<sup>f</sup> Presented, 20 Dec. 1803.

<sup>g</sup> Presented, 3 Mar. 1804:

fore the said select committee, or any other right which might be attempted to be established by them, or any of them, and that such relief might be granted to the petitioners as the justice of the case might require."

Delivering  
statements  
of the  
right.

Statement  
of the oppo-  
sing petition-  
ers.

Statement of  
a right dif-  
ferent from  
that set forth  
in the peti-  
tion, reject-  
ed.

The first question which arose before this committee, related to delivering in statements of the different rights of election for which the respective parties contended. The counsel for Mr. Mitchell, &c. produced their statement as soon as the petitions had been read: they stated the right to be, in the inhabitants of the borough, paying, or liable to pay scot and lot. The counsel for Mr. Childs stated the right to be "in the inhabitants of the borough, incorporated by the name of the mayor and burgesses of the borough of Liskeard." The counsel for Mr. Eliot objected to this statement, as being different from the right set forth in the petition of Mr. Childs. They said, that perhaps it was not necessary for the petitioner to have stated any right in his petition; but that having done so, he was bound by it, and could not now set up another, and a different right, which the opposite party had not prepared themselves to controvert; and they referred to the common case of petitions against elections and returns, where it had often been held that although a petition drawn up in general terms is sufficient, yet if the petitioner will state his complaint specially, he is confined to the proof of his particular allegations\*. The counsel for Mr. Childs agreed that it was unnecessary to have stated any right in the petition; but contended, that the material part of his client's petition was the prayer to be permitted to oppose the right determined upon by the last committee: that it was competent to him to do so by any means, either by shewing, negatively, that such was not the right, or by setting up any other right in opposition thereto: he denied, that he was obliged to give in any statement at all in this stage of the cause, having a right to reserve his statement till the opening of his case†. And

\* See *ante*, p. 4, Vol. I. p. 289.

† Mr. Childs had presented himself as a distinct party before the House; but had waived his claim to the privilege of striking the committee, &c.

admitting that although he might be unconnected with the former petitioners their interests were not adverse. See *ante*, Vol. I. p. xlvii. Introd.

he observed that this committee would not be confined to the statements of either party, but would be at liberty to reject them all, and to decide upon any other right of election which they thought proper, differing either partially or totally from any of those submitted to them by the parties in their statements <sup>s</sup>.

The committee decided that the statements should be delivered in, in the first instance <sup>a</sup>; and, that Mr. Pell's statement could not be received, but that he was at liberty to deliver in another, if he thought fit. Mr. Pell then, on the part of Mr. Childs, delivered in a statement similar to that which had been delivered in on the part of Mr. Mitchell. The counsel for Mr. Eliot delivered in a statement, in which they alleged the right to be in the mayor and burgesses of the borough.

Statements to be delivered, in the first instance.

Statement of the defending petitioners.

Evidence.

The evidence both on the part of the opposing, and of the defending petitioners, was, in a great measure, the same as that which had been produced upon the former trial: the reader will therefore, upon the present occasion, be referred to the report of that trial <sup>i</sup>, to prevent the necessity of repeating what is to be found there; and an account will be given in this place of the nature of the evidence on each side, with a fuller detail of some parts of it, and with the addition of such new proofs as were thought necessary by the parties <sup>k</sup> on the present trial. The returns given in evidence, were the same as upon the former occasion. Those read on the part of the opposing petitioners, were, from 1 Edw. 2. to

Returns.

Evidence for the opposing petitioners.

<sup>a</sup> As in the case of Steyning, 1792. 47 Journ. 683. Westminster, 1789. 44 Journ. 519.

<sup>b</sup> The same course was said to have been pursued in the case of Steyning 1792. Statements were also delivered in, immediately after reading the petitions, in the cases of Fowey, 1792, and of Malmesbury, 1797; See *post*, appendix. In the case of Carlisle, 1795, the statements were not given in till the second day of the trial, when

the opposing petitioners had already given much of their evidence.

<sup>i</sup> *Ante*, Vol. I. p. 111.

<sup>k</sup> As each of the petitioners to oppose the right reported by the select committee, contended, in fact, for the same right, they will be considered in the course of this report, as the same party; and to prevent circumlocution, they will be termed the opposing petitioners, and the other party, the defending petitioners.

12 H. 4.<sup>1</sup>; (the names of the members were read from 4 Prynne, 1039) and the returns 1 & 2 P. & M. 4 & 5 P. & M. 25 Ap. 1 Car. 1. and 2 W. & M. The return in the printed report appearing to have been taken from a copy not entirely accurate, and some more of the words of it having lately been rendered legible, a new copy of it is here given; with a caution to the reader, to observe, that it is not taken immediately from the original itself, and that there is no small difficulty in copying an instrument so mutilated.

4 & 5 P. &  
M.

This Indenture made the x daye of January \* \* \* \* \*  
Fourth \* \* \* \* \* cres \* \* \* \* \* of God Kyng & Quene of  
Englond Spayne Fraunce bothe Cyc \* \* \* \* \* Jer \* \* \* \* \*  
lem \* \* \* \* \* of the Faith Archduks of  
Austria Duks of Myllayne Burgundy & Brabant Countes  
of \* \* \* \* \* Flaunders & Tyroll Betwene John Bevyll  
Esquire Sheryfe of the County of \* \* \* \* \* thone  
pte & Willm Coryton Mayor of the Towne and Borough  
of Leskerd and the \* \* \* \* \* of \* \* \* of \* fame Borough  
of thother pt Wytnessyth that the hole Towne & Burgs of  
the Borough \* \* \* \* \* sayde Have ordayned Costitutyd &  
Deputyd o' Trusty & Welbelovyd Willm Coryton \* \* \* \* \*  
as aforeseyde & John Gayer Gent. to be y<sup>e</sup> Burgeses of y<sup>e</sup>  
fame Borough for the Tyme of this p'sent Seffyon of  
Plyment by this p'sents. In Wytnesse whereof we have  
affygged this Indentur w<sup>th</sup> o' Seales Yeven the Daye &  
Yere aboveseyd. W \* \* \* \* \* ton.

<sup>1</sup> The list is continued by Prynne down to 7 Edw. 4. which is the first separate return for<sup>1</sup> Liskeard. See *ante*, Vol. I. p. 119. Mr. Lemon in his evidence stated, that the returns of Members for boroughs, by Schedules, continued till the reign of H. 4. It is however quite clear, that many were returned by way of Schedule, long afterwards. See *ante* Vol. I. p. 409. The latter Schedules were annexed to one inden-

ture between the Sheriff on one part and several electors of each borough on the other. Mr. Brady has given the form of such an indenture, 2 H. 5. Appendix, p. 31. p. 29. On the other hand, he gives instances of distinct returns for boroughs, so early as 26 Edw. 1. p. 133. See 1 Ld. Gl. 450. And Prynne's *Brev. Parl. Rid.* 252, 256, 261. *cit. ibid.*

The same charters were given in evidence as were produced on the former trial, with the addition of a charter of Edward the Black Prince, (11 Sept. 28 Edw. 3.) under his privy seal, granting to the borough an immunity from toll. This charter was produced in evidence by the counsel for the defending petitioners. Charters.

The following entries were read from a book, called the Constitution book; they are adverted to, *ante*, vol. i. p. 116.: but it is thought better to give them in this place at greater length. Constitutions.

‘Burgus de Lyfcard, al’s Lyfkerrett. Constitutions made and agreed upon in the common hall of the borough aforesaid at the leet or law day there, holden the ninth day of April, in the thirtieth year of the reign of our Sovereign Lady Elizabeth, by the grace of God of England, France, and Ireland, Queen, defender of the Faith, &c., for the better government and direction of the burgeses and inhabitants there, for the suppression of sundry offences and enormities, to the maintenance of peace and quietness, and to the confirmation of the wealth public of the said town; by Peter Mark, Gent. mayor of the said town and borough aforesaid, and the eight chief councillors and governors of the said borough, according to a certain clause unto them by her said Majesty’s charter bearing date at Theobalds the twenty-sixth day of July, in the nine-and-twentieth year of her Majesty’s reign, amongst other things made and granted; together with the general consent of the residue of the burgeses and inhabitants then also confirmed, as followeth:

1. ‘*Imprimis*, for the better government of the said town and upholding of the good estate thereof, it is generally agreed, that nine of the chief inhabitants, whose names are underwritten, shall be henceforth reputed and taken to be the superior burgeses, chief masters, councillors, and governors of the said town. Superior burgeses.

The names follow <sup>m</sup>.

<sup>m</sup> There are several leaves dated 24th Oct. 29 Eliz. in which these persons are by name the granting parties, and are described as the chief burgeses; two of their names appear in a grant 5 May, 8 Eliz.

Inferior  
burgesses.

2. 'Item, farther it is likewise agreed, that for the better assistance of the government aforesaid, and for the stronger confirmation of the constitutions now made, or hereafter to be made, to the maintenance of the general unity, peace, and concord of the burgesses and inhabitants aforesaid, to the glory of God and the public benefit of this private borough, that there shall be fifteen others of the most able and most sufficient of the residue burgesses, whose names are likewise underwritten, which shall henceforth be reputed inferior burgesses, as the homagers at law days, and also enabled to divers other purposes as are hereafter mentioned, touching the state of the town and borough aforesaid.

The names follow.

Amotion of  
burgesses.

3. 'Item, it is likewise generally agreed, that none of the persons before named, as well superior as inferior burgesses, shall be henceforth altered or amoved, unless it be in respect of death, or in respect of some other imperfection or misdemeanor, or departure to dwell out of the said town and borough, to be adjudged and determined by the mayor for the time being, and the residue of the said superior and inferior burgesses, or by the mayor for the time being, five of the superior burgesses, and eight of the inferior burgesses for the time likewise being at the least.

Burgesses to  
bear certain  
offices, and  
not strangers.

4. 'Item, it is like manner agreed, and by general consent of all the burgesses and inhabitants fully concluded, that no person or persons whatsoever shall henceforth be chosen, elected, or nominated, mayor, constable, collector, clerk of the market, serjeant at the mace, or any other inferior officer whatsoever within the said town and borough aforesaid, heretofore used, unless such officer and officers be at the time of such choice, election, or nomination, a burgess commorant, inhabitant, and dwelling, within the town aforesaid, and not any longer to continue in any such office or offices whatsoever, than he or they be burgesses commorants, inhabiting and dwelling within the said town as aforesaid.

Offices to be  
holden du-  
ring the  
pleas.

5. 'Item, we do constitute and ordain, that all offices and officers which are to be appointed and disposed by the town,  
and

and not by the mayor only (as incident to his office), shall henceforth be and remain but only *durante bene placito*, and that also none of the chief masters and governors of the said town for the time being shall henceforth by himself, or by his assignee or deputy, exercise or use any such office, or be admitted any such officer contrary to the true intent hereof upon pain of disfranchisement, and such other pains and punishments as shall be adjudgeable.

6. ' *Item*, we do likewise constitute and ordain that no laws, orders, or constitutions whatsoever, to be made henceforth for the government of the said town (as to be deemed available and forceable) are to be obeyed and observed, unless the same be agreed by the mayor, five of the eight of the masters and governors of the said town, and eight of the fifteen of the inferior burgesses of the said town for the time being; and that as well by the like number, and by the like persons, all whatsoever laws, orders, and constitutions, to be altered, and disannulled, and not otherwise; as also all ambiguities, questions, and doubts of any whatsoever constitutions to be adjudged, determined, and decided.

The number by whom the constitutions are either to be concluded, or annulled.

9. ' *Item*, we do constitute, that every inhabitant shall from time to time against his own house and ground and ward, until the midst of the street, make and cleanse the street and ward, and that no inhabitant shall lay any rubble, dung, or any thing that shall be filthy, troublesome, unseemly, or indecent in the streets. But shall at his own charges remove the same, and the pig-drivers to be kennel-rakers for the cleansing against the town lands and walls, and all the streets and forewards at the least every Saturday to be cleansed.

Cleansing of the Streets.

14. ' *Item*, we do constitute that every inhabitant, not charged to the subsidie, shall plant and keep in their gardens, from time to time, turneps, coles, and cabbage, cole parsneps, leeks, onions, and carrots, and other like roots for their better relief.

Tillage of Gardens.

17. ' *Item*, the mayor's accompts to be made in the town-hall before the mayor, his brethren, and the rest of the chief burgesses and inhabitants, the Thursday after Martin's day, as it hath been accustomed, or else to be imprisoned until

The Mayor's accounts.

until he accompt, and satisfy his arrearages, or such other fine and punishment as by the said number of governors shall be adjudgeable, without special licence and consent of the number aforesaid first obtained to the contrary.

Grants and  
leases of the  
town lands.

18. *Item*, it is agreed and finally concluded that no lease, estate, or grant whatsoever henceforth shall be made or assented unto, of any the town lands or livings whatsoever, but for three lives, or one-and-twenty years, or for fourscore and nineteen years determinable upon three lives, and that in possession; and also, that all such leases, estates, and grants whatsoever, shall be made and granted in open court by the general assent and consent of the mayor for the time being and the whole corporation, or by the assent and consent of the mayor for the time being, six of his chief brethren and masters, and thirteen of the said fifteen for the time being, and not otherwise; except it be some lease for trial of the title of any lands in controversy, and all leases, estates, and grants in other sort made and granted shall be henceforth utterly void, and such person and persons so attempting either in the procuring or consenting to any other manner of lease, estate, or grant, to be disfranchised.

Infringe-  
ment of the  
Liberties.

22. *Item*, we do constitute, that if any inhabitant do break or go about to break, lose, or infringe any privilege, liberty, authority, jurisdiction, lands, or hereditaments had, used, or unto us granted, he to be grievously fined and punished, or otherwise disfranchised at the discretion of the number of the governors aforesaid.

Excess of  
Toll, and  
withdrawing  
of grists.

23. *Item*, if the miller be convicted, by any lawful person by oath of excessive toll or misuser of any grist, or withdrawing any suitor through his negligence, to be fined forty-pence according to the old constitution, and the miller to be sworn at the law days, and to be imprisoned for his fine, until it be paid, and likewise for them that withdraw their grist and be convicted by the miller's oath, or any other lawful person, to pay the value of the toll, and be imprisoned for the same until it be paid.

Impleader of  
burgesses and  
inhabitants  
in no foreign  
court.

25. *Item*, we do agree, as in our charter is expressed and granted, that no burgesses or inhabitant whatsoever shall henceforth sue and implead out of this borough any burgess or inhabitant of the same in any foreign court, concerning matters



matters determinable within the same, upon pain of four pounds, and disfranchisement, and such other punishment as shall be adjudged, and also to withdraw any such foreign suit at the costs and charges of such offender or offenders.

27. *Item*, it is agreed that every burgesse shall once every year at the usual and accustomed time thereof, truly pay one penny of silver in testification of his burgesship<sup>a</sup>, and all and every other person and persons as burgesse whatsoever which shall not accordingly either by himself or his assigns make such payment, or refuse to make, they shall not be admitted or accounted any longer as burgesse, but to be utterly thereof debarred of what condition or estate soever they be.

The manner of the continuance of burgesse, and discontinuance.

28. *Item*, it is agreed that if any burgesse or other inhabitant whatsoever, do receive or admit any stranger to dwell in any of their houses within the said borough, without licence of the mayor, five of the masters, and eight of the fifteen, first had, and do not remove such stranger within one quarter of a year after warning by the mayor for the time being given, shall forfeit for every such offence ten pounds.

Avoidance of strangers.

29. *Item*, it is agreed that every town-born child shall pay for his fine of burgesship five shillings, and every stranger thirteen shillings and four-pence.

The fines of burgesse.

20th Oct. 43 Eliz.

'Whereas the farmers and lessees unto the mayor and burgesse of this borough have been heretofore accustomed to have and receive, and have had and received of every butcher and victualler which doth sell any victuals or other wares on any Saturday in the shops, under the apprentices or before the door of any burgesse or inhabitant of this borough, the third penny and part for every beef, half beef, and quarter of a beef, and so for every mutton, veal, pork, lamb, and other victuals whatsoever, sold in stalls or shops according to the rate as the said farmers and lessees have had and received of butchers, victuallers and others, which

The collection of the third penny.

Quare.

<sup>a</sup> From entries in the Innocent's court book, (see ante Vol. I. p. 116.) it appeared that the sum of 9s. 4d. was collected for burgesse-pence, 28 Dec. 1692,

10s. 9d. 28 Dec. 1703, 3s. 3d. in 1773. The number of burgesse therefore on the first of these days, was 112, on the second, 129, on the third, 39.

did stand in the town standings, shops or rooms; for the better confirmation whereof, and for the more certainty in like cases hereafter, we John Hunt the younger, mayor, John Vosper, Benedict Piper, John Hunt the elder, Thomas Sampson, Thomas Fuidge, and Thomas Sane, six of the chief burgessees and council of the borough aforesaid, do constitute and ordain, that the farmers and lessees to the mayor and burgessees, shall for ever hereafter have, receive, and take the third penny for every poll as is before recited, without denial of any burgessees or inhabitant within the borough aforesaid; upon pain that every burgessees or inhabitant refusing or denying the performance thereof to be utterly disfranchised, and to pay twelve pence for every such refusal as aforesaid; to be levied of their goods lands and tenements within the borough aforesaid, by virtue of a process unto the serjeants of the mace or one of them for the time being, under the mayor his hand and seal for the time being directed.

*Quere.*

Annulled, 23 Oct. 8 Jac. 1. A. D. 1610.

Agreement  
to keep se-  
crets.

18 May, 30 Car. 2. A. D. 1680. 'It is jointly agreed and consented unto (in the council chamber) by us the mayor, recorder, and the rest of the magistrates of the said borough, and we do faithfully promise and engage each to other, wholly to conceal and keep secret all matters and things by and between us treated of and mutually agreed on, upon pain of disfranchising him and them that shall reveal or discover the same, or any part thereof,

*Quo war-  
rante, 36  
Car. 2.*

'In the thirty-sixth year of the reign of our sovereign lord King Charles the Second, a writ of *quo warranto* was brought against the borough of Liskerret *alias* Liskeard in the county of Cornwall, a true copy whereof doth here follow, *viz.* (Here follows the writ.)

'When this *quo warranto* was brought, William Dunkin, Gent. was mayor, after whom succeeded Emanuel Pyper, Gent.; upon advice taken, it was thought fit not to contend or plead to the said writ, but to submit to his Majesty's royal grace and favor, and thereupon the mayor and capital burgessees did under their hands and common seal surrender their liberties, franchises, and privileges into his Majesty's hands,

hands, which surrender was made in the behalf of his Majesty to the Right Hon. John Earl of Bath, thereunto authorised, then in Plymouth for the same purpose sent by his Majesty; whereupon in the term of St. Hilary next, the town employed the said Mr. Pyper then mayor to London about the same, who petitioned his Majesty King Charles for a new charter, and for restoring the said borough to their ancient liberties, which they had either by prescription or by any other ways by former charters from his Majesty's royal predecessors, Kings and Queens of this realm, or from the Dukes or Earls of Cornwall, which petition his Majesty was most graciously pleased to accept and grant, remembering when he was Duke of Cornwall, the entertainment he received in the said town, in the time of the civil war and rebellion, and did recommend the same to the Earl of Sunderland, then principal Secretary of State; but before the same could be perfected (it pleased Almighty God) that on the second day of February being candlemas day 1684, in the morning his sacred Majesty was suddenly taken sick, and as it were dead, and died that week to the universal grief of all his good subjects: whereupon James Duke of York and Albany, his Majesty's only brother was immediately proclaimed king, by the name of James the Second; this King Charles the Second leaving no lawfull issue behind him: upon which a new address and petition was presented to King James his said Majesty in behalf of the said town, by the Earl of Bath, the Lord Arundell of Trerise, and the said mayor, in the Privy Garden at Whitehall; who did graciously receive the same, the mayor kissing his Majesty's hand; and afterwards in pursuance thereof a new charter was by and in the name of King James the Second, under the great seal of England, granted unto the said mayor and burgesses, bearing date at Westminster, the sixteenth day March, in the first year of his reign, wherein being informed of the loyalty of the said town in the late rebellious civil war, there coming to the said town in pursuit of the Earl of Essex, General of the Parliament's Forces and Army, the late pious King Charles the First, and King

New charter  
by K.  
James 2d.

Charles the Second then Duke of Cornwall, these special words are inserted,

*“ Nos igitur præmissa considerantes et ex notitiâ nostrâ pro certo habentes, quod burgenſes burgi illius patri nostro præcarissimo in bello contra peſſimum genus rebellorum ſeſe fideliter reddiderunt, et domos et familias relinquentes in memorabili prælio et victoriâ de Bradock Down, anno domini 1642, in exercitu Cornubiensî præcariffimi patris noſtri fortiter pugnâvêre in deſenſione dicti præcariffimi patris noſtri regis, quanquam uxores et familia eorum tempore ſub poteſtate rebellorum remanſêre.”*

[Mr. Hoblyn, an alderman of Liſkeard, a witneſs on behalf of the oppoſing petitioners, related, that this charter had been taken out of the cheſt of the corporation about the year 1793, and carried to Lord Eliot's, at Port Eliot, to be examined; a *ſubpœna duces tecum* having been ſerved on the town-clerk to produce it at the enſuing aſſiſes. Since that time it has not been heard of. Mr. H. added that this charter was never regarded by the corporation, but looked upon as waſte paper. And Mr. Carthew ſaid, that the charter of Q. Eliz. had always been conſidered to be in force, and was acted upon.]

By this charter 21 perſons are declared to be free of the borough. Moſt of them are perſons of high rank.

‘ At the Court at Whitehall, 23d June, 1688. By the King's moſt excellent Maſteſty, and the Lords of his Maſteſty's moſt honorable Privy Council:

Removal of  
certain bur-  
geſſes.

‘ Whereas by the charter granted to the borough of Liſkeard, in the County of Cornwall, a power is reſerved to his Maſteſty by his order in council, to remove from their employments any officers in the ſaid borough, his Maſteſty in council is pleaſed to order, and it is hereby ordered, that Emanuel Pyper, Eſq. and capital burgeſſes, Thomas Pyper, Samuel Longford, and Henry Helliard, capital burgeſſes, Bodvill Earl of Radnor, Jonathan Trelawney, John Arundell of Tremedarth, Richard Eriſſey, and Sir John Coryton, Baronet, freemen and burgeſſes, be and they are hereby removed and diſplaced from their ſaid offices, in the ſaid borough of Liſkeard.

W. BRIDGEMAN.

‘ When

‘When an inferior person, tradesman, or one that served an apprentice within the borough is admitted a burges, the form of the oath is,

“You shall dutifully and obediently behave yourself to the mayor and magistrates of this borough; you shall also be contributory to all such rates, taxes, and talliages as shall be reasonably and lawfully taxed and assessed upon you; you shall also be aiding and assisting to the mayor and other officers of this borough in keeping and preserving of the King’s Majesty’s peace; you shall not do any act which may be prejudicial to the liberties, franchises, or inheritance of this borough or corporation, but shall give your best counsel to the mayor and corporation when desired, and shall do and perform all and every other thing as other burgeses of this borough do or of right ought to do during such time as you shall remain a burges within this borough, as near as God shall give you grace; so help you God.”

Burges’s  
oath.

1 Oct. 1751. ‘Whereas by the usage and constitutions of this borough, no person can be lawfully elected freeman thereof but at an assembly of the mayor and capital burgeses, and with the consent of the major part of them; in order to preserve such usage inviolate, and to deter any mayor from claiming to himself the privilege of swearing of freemen, and from presuming to exercise such privilege without the concurrence of the capital burgeses; we the mayor and capital burgeses of this borough do hereby, and by virtue of our power of making bye-laws, ordain and enact, that no person from henceforth shall be sworn a freeman of this borough without the concurrence of the majority of the mayor and capital burgeses thereof then in being; and if the present or any future mayor or his deputy shall swear or admit any person a freeman of this borough not elected and chosen by a majority of the mayor and capital burgeses of this borough duly assembled, such mayor or deputy mayor offending therein shall forfeit for every such separate offence the sum of one hundred pounds, to be recovered by action of debt to be brought in the name of the recorder, or capital steward, or town clerk of this borough for the time being; (with costs of suit to be applied to the use of the mayor and

Mayor alone  
not to admit  
burgeses.

burgesses of this borough;) and the person so sworn or admitted shall not thereby receive or gain any freedom privilege or advantage incident or belonging to a freeman of the said borough.

22 Oct. 1751. 'We whose names are hereunto subscribed, capital burgesses of the said borough, do consent to and approve of the above bye-law in every particular.

Abridgment  
of charter of  
Eliz.

'An entry was also read from the book of constitutions, of an abridgment of Queen Elizabeth's charter, beginning thus: "Elizabeth by the grace of God Queen of England, France, and Ireland, by her Grace's letters patent dated at Theobald's, the 26th day of July, in the 29th year of her Majesty's reign, granted unto the mayor and burgesses of Liskerret, *als.* Liskeard, (amongst divers *new* liberties and privileges) that they should have and enjoy" &c.

For prevent-  
ing extraor-  
dinary ex-  
pences at  
the law  
courts.

A constitution made for preventing extraordinary expences at the law courts. 'For prevention of extraordinary expences at the law days held within this borough, which have heretofore been occasioned by the disorder of the common burgesses, and otherwise to the great charges and damage of the town, be it therefore hereby constituted, ordained, and agreed on by the mayor, magistrates, and capital burgesses of this borough in common council assembled, that hereafter the mayor for the time being shall be allowed for the two law courts but eight pounds, (that is to say,) for the law court held after Easter for ordinaries forty shillings, *viz.* for the magistrates and the grand jury, being in all twenty-four, twenty-four shillings, and the residue for such as it shall please the mayor for the time being to invite or appoint, and twenty shillings for extraordinary expences; and for the law court at the election of the new mayor, and the day following, five pounds. And that if there shall be any other or more persons admitted than such as the mayor or the steward which the mayor shall appoint for such purpose, then the house where such law days are or shall be kept to stand to it themselves. And be it hereby further ordained and constituted, that for prevention of the poor to lie at the door at such law days, there shall be allowed each law day to be distributed in money to the most indigent poor within the

*Quere.*

the town ten shillings, to be delivered to their houses, by some one of the overseers of the poor; and that the mayor shall not be allowed more than is formerly expressed on the passing his account for the charges and expences aforesaid, any constitution, use, or custom to the contrary in any wise notwithstanding.

They read an entry from Rymer's *Fœdera*, vol. 2. p. 879. Rymer.  
from whence it appeared that Edmund Earl of Cornwall died in 1301. They also read the following passage from Brady on Boroughs, p. 33. "Likewise in the charter of Helleston in Cornwall, 2 *Johan. ut sit Burgus noster de Helleston liber Burgus.*" See Appendix to Brady, No. 8. Brady.

The following was the substance of their parol evidence. Parole evidence for the opposing petitioners.

Mr. Carthew, the town-clerk, was called to produce the charters, and the other muniments of the borough. He produced a book of admissions of freemen, the first entry in which was of the year 1758, and the last in 1802, and he related who of the present corporators were resident, and who were not. He said, that a court of record was held in the borough every three weeks; that all the inhabitants were suitors there; and that any other person might sue there, if the cause of action arose within the borough.

Upon his cross-examination by the counsel for the defending petitioners, he gave the following account of the state and government of the borough. In the election of the mayor, the nine capital burgesses, (or aldermen) name one person, and the free-burgesses, whether resident or not resident, who have been sworn upon the grand jury at the court leet, name another, of the capital burgesses; and a choice of one of these two is made by the whole of the corporation, about 30 in number. A capital burgess is chosen by the capital burgesses from among the free burgesses who have been sworn at the leet upon the grand jury. The free, or common burgesses are elected by the capital burgesses, and sworn in. There is no previous qualification or inchoate right to the office. Some of these are sworn in also at the leet, to serve on juries, to which they are summoned by a warrant from the mayor; these are they who

X 4

present

present one candidate for the mayoralty. There is no fixed number of them, but they are in general 15, or 16. The inhabitants of the town are about 1500 in number; the distinction between them and the burgesses is perfectly well known: no inhabitant was ever considered, as such, qualified to become a capital burgess, nor was any instance remembered of any one of them claiming to be admitted as an inhabitant, into the corporation, till Michaelmas 1803, when Mr. Childs (the petitioner) and about 40 more, made a demand in writing to be admitted burgesses, and were refused.

Revenue of  
the borough.

It also appeared, from the evidence of other witnesses, called on the part of the opposing petitioners, and cross-examined by the other side, that the revenues of the borough arise from dues payable in respect of stalls and weights; from the profits of certain land; from the Boagara mills; and from the tolls of the fair. The freemen pay only half toll; the inhabitants pay full toll. (This distinction was, however, denied by some of the witnesses.) The inhabitants formerly considered themselves bound to carry their corn to be ground at the mills; but that practice is now discontinued. The poor of that part of the parish which lies within the borough, are supported from the revenues of the borough. The officers of the borough, such as constables, and serjeants at mace, are chosen from the inhabitants at large. Mr. Morhead, who canvassed the borough about 40 years ago, and who lived about a mile from it, addressed himself to none but the freemen.

Mills.

James Fitz said, that the jury at the court-leet was taken from the freemen only; but that he had known instances of some of the inhabitants at large serving on juries at the law-courts, in the trial of actions on contracts.

Reputation.

The evidence of Mr. James Jenkins for the opposing petitioners, was very material: he said he had known Mr. Trehawke, a freeman, who had died 14 years ago, in his 82d year: that upon their first acquaintance, Mr. Trehawke had informed him, that the right of election at Liskeard was in the inhabitants who paid scot and lot; and that there had formerly been great confusion in the town at the time of



of elections; for which reason the right had been restricted to the body who now exercise it: that he was surprised that Lord Eliot's interest had not been opposed; but that it was probable, if the charter were translated, and understood, the eyes of the inhabitants would be opened to their true rights. He added, that he had also heard from three or four other aged persons, since deceased, that in their younger days, the right had been in the inhabitants, but that it had been altered by Lord Eliot's family. The defending petitioners, afterwards, called several witnesses to discredit Jenkins's testimony.

The evidence for the defending petitioners consisted, in the first place, of the following written instruments.

Evidence for the defending petitioners.

The charter of Edward the Black Prince\*, mentioned *supra*, p. 281.

Indenture, 4th March, 14 Rich. 2. Witnessing, that although Thomas Hatchem and W. Deane have enfeoffed the mayor and burgeses of Liskeard and their successors of a yearly rent of 20s. nevertheless, the mayor and burgeses will and grant for them and their successors, that if W. Deane release to them 4s. yearly rent for a common house, &c., from thenceforth the said deed of feoffment shall lose its force. "In testimony whereof the parties aforesaid their seals interchangeably have put." (Wax of the seal decayed.)

Ancient deeds, 1391.

On Wednesday next after the feast of the Assumption, 15 Rich. 2. a release by Wm. Deane the elder to the mayor and burgeses of Liskeard of a rent of 4s.

2 Nov. 22 Hen. 7. Indenture of lease of land between J. F. mayor, and J. R. and others; witnessing, that the said mayor for him and his successors, by the advice and consent of all the burgeses of the said borough, hath let, &c. In witness whereof, the said mayor, by the advice and consent of all the burgeses of the said borough, hath put the common seal of the same borough, &c.

24 Mar. 2 & 3 P. & M. Release, by Joan Kest, of her right in certain messuages, to John Connock, mayor of the

1555.

\* The Earldom of Cornwall, though not a county palatine, had many royal ties belonging to it. *Hale de Jure Maris*, p. 1. ch. 7.

Bridges, burgesses of the said borough to be at the Parliament &c., whereby plaintiff had sustained damages to the value of 500*l*. The defendant pleaded not guilty; upon which issue was joined; but the judgment of the court (if any was given) is not recorded. See the entry in 12 Jour. p. 584. 13 Mar. 1698. *ante*, vol. i. p. 118.

Court rolls.  
1488.

From the court rolls, 3 H. 7. An inquisition between the mayor, and burgesses, plaintiffs, and John Tege and William Leach, defendants.

1498.

13 H. 7. ' At this court came W. C. & J. C., and did fealty to the mayor and commonalty to become free burgesses of the aforesaid borough, and each of them gives for a fine 2*s*. 6*d*.

1517.

8 H. 8. At a law court held on Thursday next after the feast of the Epiphany, J. R. & J. M. made fine to be free burgesses, and they are sworn and give for a fine each of them 2*s*. 6*d*.

1531.

22 H. 8. At this court came J. R. & J. H., and prayed of the mayor and commonalty license to be burgesses within the borough aforesaid, according to the ancient custom of the borough, and they are admitted by their oath, and give &c. There were many similar entries. The mayors in their accounts make themselves debtors for these fines.

1551.

22 H. 8. 2. Presentments of reliefs due to the mayor and burgesses; and an order that the *propositus* shall distrain on the next heirs to do fealty to the mayor and commonalty. Many other similar entries were stated to appear on the court rolls.

1603.

2 Jac. 1. The following lists appeared in the court books. 1. Names of the free tenants: 65 names. 2. Names of the burgesses: 69 names. 3. Names of the regiants: 53 names. It appeared that some of the names had been struck out of the last list, in consequence of the persons having been admitted to the freedom of the borough on payment of a fine, and sworn.

1604.

Similar lists.

1607.

4 Jac. 1. At a law court and view of frank pledge held 29 Apr. 4 Jac. 1. they present J. P. for that he keepeth a public

public shop within the liberty not being a burges, &c. " At this court S. P. is admitted to be a burges within the borough aforesaid, and to have the liberties and privileges, and franchises of the same borough; and he found pledges for his fine, and is fined 13s. 4d. because he was born without the borough. 3 similar entries: R. C.'s fine was 5s. because he was born within the borough.

In 1663, & 1664, there appear to have been 8 capital burgeses, besides the mayor; 110 inferior burgeses: and *res. burgensium pradii*. 3.

2a.

A part of the charter of Q. Eliz. was read, whereby it is ordered that no burges or other inhabitant within the precincts of the borough, may implead other burgeses or inhabitants &c. out of the borough.

The following extract was read from the book of constitutions: 7. Apr. 1719.

' Whereas it hath been the constant custom and usage within this borough, that the mayor of the same after the expiration of the year of his mayoralty, at the Easter then following, takes on himself the charge of the poor within the said borough for the year then ensuing, and chooseth three other inhabitants of the said borough to be his assistants therein, and are called overseers of the poor of the said borough, whereof the magistrate overseer is the chief, and called the magistrate overseer, and by and with the advice and consent of the mayor of the said borough for the time being, is and ought to be the principal and sole director in all things concerning the provisions of the poor that year, as well for their weekly pay, as for their cloathing, shoes, and other necessities, notwithstanding which several of the inferior overseers have of late years taken upon themselves, and without the order or consent of the mayor or magistrate overseers, to give orders for woollen, linen, shoes, cards, and other necessities for the said poor, whereby it hath been found they have charged the said borough on passing their accounts much more than they could have done, if the said custom had been observed, the which breach of custom is a manifest prejudice to the corporation; therefore to prevent the same mischief for the future, we the

Provisions  
for the poor.

the mayor and capital burgesſes of the ſaid borough, do hereby give this timely notice to the preſent overſeers of the poor of the ſaid borough, that we reſolve to maintain, ſupport, and continue the ſaid cuſtom, and that if any of the inferior overſeers do take up, beſpeak, provide, or pay any money, linen, woollen, ſhoes, cards, or other things whatſoever, for or towards the relief or maintenance of the poor of the ſaid borough, without the knowledge, direction and order of the ſaid mayor for the time being, and of the magiſtrate overſeer aforeſaid, the ſame will not be allowed on their account; and we do declare that this order ſhall from henceforward be kept and eſtabliſhed; and we do hereby direct and deſire the ſaid magiſtrate overſeer now in being, and all other magiſtrate overſeers for the future, to obſerve the ſame, and to take due care that the poor be in all things ſufficiently provided for, according to former uſage within this borough, and that upon application to him made by the inferior overſeers or either of them concerning the ſame, he take the advice and conſent of the mayor for the time being, ſo that ſuch ſpeedy and effectual orders and directions may be given therein, as the caſe ſhall require.

## Returns.

The returns from 6 & 7 Edw. 4, to 18 Ap. 1660, were entered as read. The returns of 16. Nov. 26 Eliz. and 26 Oct. 30 Eliz. were produced: to the former were appended the remains of a ſeal, upon which a large fleur de lys was ſtill diſcernible, and the letters I. S. K. E. A. R. D. In the latter, only the label of the ſeal remained.

The returns from 1661 to 1790 were brought from the petty bag office. In 1722 Edward Eliot and John Louſdale were returned. This was the firſt return of any perſon of the name of Eliot.

## Polls.

1698.

Two papers were given in evidence; one of them purported to be the copy of an old poll, taken 2 Aug. 1698. At the head of the liſt of voters, appeared the word ‘freemen.’ At the bottom of the liſt were theſe words; Charles Trelawney, Eſq. and John Allen of Loſtwithell were not called by the mayor’s liſt of freemen, yet they both voted.

“ All

"All the rest of the voters were called over by the mayor as freemen, who all voted, *ut supra*."

On the back of the paper was the following indorsement;  
"A poll taken at the election of burgesses to serve in parliament for the burgh of Liskeard, the 2d of August, 1698.

"There being present who voted as freemen in all 99 persons, each having two votes, makes votes 198; whereof

Mr. Darrell had	-	68	
Mr. Buller	-	56	excepted against 6.
Mr. Bridges	-	54	excepted against 5.
Mr. Bertie	-	18	
Mr. Trelawny	-	1	
Mr. Pyper	-	1	

198

"Exceptions against Mr. Buller's votes; 2, as no freemen.  
4, as paupers.

"Exceptions against Mr. Bridges' votes; 2, as no freemen.  
3, as paupers."

The second paper appeared to be a list of freemen made out for the convenience of a particular candidate; together with an entry for what candidate it was expected that each freeman would vote. The date was in the year 1714.

List of freemen, and their votes. 1714.

The charter granted to the borough of Launceston, 6 R. 2., containing by *inspeximus* the grant from Richard Earl of Cornwall. Charters of Laist and Helleston 4.

The charter granted to the borough of Helleston, 1 R. 2. See copies of these charters at the end of this case.

Extracts from the Journals of the House of Commons, Journals.

17 Mar. 1723-4. 20 Jour. 297. The report from the committee of privileges and elections touching the election for the borough of Dunheved *alias* Launceston. "The petitioner's counsel insisted, that this borough was first incorporated in the time of Philip and Mary: that the right of election was founded on their charter, which incorporated the mayor and 8 aldermen, all named to be inhabitants; Launceston.

<sup>1</sup> See ante Vol. i. p. 112. *post*, note (A).

and gave power to them, or the major part of them, to admit inhabitants to be burgesſes or freemen; which are ſynonymous terms in the charter: that the right of election is in the mayor, aldermen, and freemen, being inhabitants at the time they were made free, and not receiving pay of the pariſh.

“ The ſitting member’s counſel inſiſted, that this is an ancient borough, and before their charter ſent members to parliament time out of mind: that the charter confirmed all their ancient rights and privileges, and neither did nor could alter the right of election, which was in the mayor, aldermen, and freemen ſworn before the mayor and aldermen, or the major part of them, whether ſuch freemen were inhabitants or not, at the time of admiſſion, and who do not receive alms or charity from the pariſh.”

The date of the charter is then ſtated, (15 Feb. 2 & 3 P. & M.) and a ſummary of its contents: the confirmation of their ancient rights: the power granted “ to the mayor and commonalty” to elect “ *tales de discretioribus, probioribus, & magis quietis viris et inhabitantibus prædicti burgi, fore et eſſe burgenſes, &c.* with a power to remove for certain offences *aliquem burgenſium liberorum hominum ſive inhabitantium burgi, &c.*: and, the clauſe for electing burgesſes to parliament.

“ The ſitting member’s counſel inſiſted, that the preſcriptive right was evident, from the whole tenor of this charter; which begun with recitals, by *inſpeximus*, of no leſs than 8 ancient charters granted by former kings, viz. Edw. 6. H. 8. H. 7. Edw. 4. H. 5. H. 4. R. 2. and Richard Earl of Cornwall; all which charters, and all grants, liberties, and cuſtoms, contained therein, whether by grant, cuſtom, or preſcription, are confirmed by this charter of P. & M., except the election of portreeves.” They produced returns of 4 & 11 Sept. 1 Mar. 2 & 3 P. & M. 26 Eliz. 30 Eliz. and 16 Car.

“ The ſitting members’ counſel offered to prove, that foreign burgesſes had joined in returns to parliament ſince the charter of P. & M., which the petitioner’s counſel admitted to have been done in and ſince the reign of Jac. 2.:  
but

but insisted, that the foreign burgesſes had no right; and that the charter of P. & M. was the first charter of incorporation of this borough, and the only charter under which the burgesſes acted; and observed, that all precedent grants or charters therein recited, were only grants or charters of confirmation of privileges, and none of them charters of creation, or incorporation." Then they called witnesses to prove that non-resident freemen had usually voted, and were never denied. One witness on the other side, spoke to the out-burgesſes having been objected to in 1714; but he could not tell whether they had been received or rejected by the mayor. The committee resolved, that the right of election was "in the mayor, aldermen, and freemen, being inhabitants at the time when they were made free, and not receiving pay of the parish." The House agreed in this resolution. p. 300.

24 Mar. 1734-5. 22 Jour. 429. Another report from the committee of privileges and elections touching an election for this borough. The committee resolved, "that the aldermen of the borough ought to be elected out of the legal freemen of the said borough only." The resolution above-mentioned of 17 Mar. 1723, was read, as the last determination.

11 Mar. 1775. 35 Jour. 189. The appointment of a select committee to try the matter of the petition of Philip Yorke and Francis Cust, Esqrs., and also of the petition of Richard Johns, jun. alderman, and of Matthew Wills and others, freemen of Helleston. See the report of that case, 2 Ld. Gl. 1. And see the case of Helleston, 1790. 1 Fra. 3.

The entries in the Journals, 5 May, 1660; 28 Mar. 1681; 13 Mar. 1698, mentioned in vol. i. p. 117, 118, were also read.

The defending petitioners produced many witnesses, who spoke, from very authentic sources of information, to the known and ancient distinction between the burgesſes or freemen, and the inhabitants of the borough; and to the right of election having always been considered to be in the capital burgesſes, and the freemen, and not in the inhabitants.

Supplemental resolution.

Parol evidence.

Right of voting.

tants: that in the year 1754, when Mr. Stanhope and Mr. Nugent were candidates, the town-clerk called over the names of the capital burgeses and freemen from a list; and that each person who was present, voted, as his name was called; that none of the inhabitants voted, although they were then attending in the hall, as spectators, in great numbers. They proved, with respect to the tolls paid upon the sale of corn and cattle at the fairs, that the freemen paid but half toll, and the inhabitants, the full toll; and that the same privilege was allowed to the freemen upon the sale of their corn in the market, when they claimed it. They proved also, that that part of the borough, which lies within the parish of St. Clear, was charged to the poor's rate for that parish.

Tolls.

Poor's rate.

Argument  
for the op-  
posing pe-  
titioners.

For a great part of the arguments on behalf of the opposing petitioners, particularly, respecting the meaning of the word burgeses and the presumption in favor of the right of the inhabitants at common law, the reader is referred to the argument for the petitioners in the former case. Upon the present occasion, they did not so much insist that the inhabitants were entitled to the elective right as corporators: they contended however that Q. Elizabeth's charter of incorporation was originally extended to them; but that whether they were incorporated or not, the right of election belonged to them, both before the charter and afterwards. They now argued,

Right of  
election per-  
sonal:

The right of election contended for by the inhabitants upon the present occasion, is not a corporate right; consequently, it is not material to consider, whether it belongs to them in a corporate capacity, or not. It is a personal right, derived to them from prescription, and which belongs to them in their character of inhabitants, before a corporation existed; by a higher, and antecedent title. Without discussing what, or whether any sort of inheritance can be enjoyed by inhabitants not incorporated, it is clear, that the right of election may be so enjoyed; of which the city of Westminster<sup>\*</sup> is an instance; and many others might be added.

may belong  
to inhabi-  
tants not in-  
corporated.

<sup>\*</sup> See *ante*, p. 299.

<sup>\*</sup> Vol. i. p. 125, &c.

<sup>\*</sup> See 2 Ld. Gl. 299.

<sup>\*</sup> See Aylesbury, *ante* p. 257.



The early charters granted to this borough, are charters of immunity and privilege; not of incorporation. At the time when they were granted, the inhabitants of towns and boroughs, where trade first began to flourish, and the rudiments of liberty first appeared, were just emerging from that state of vassalage, in which the lower orders of society were then held under their superiors. Their former state of servitude, indeed, is indicated by the language of the first charter, by which it was granted to the burghesses, to be free. In the charters immediately succeeding, there are many proofs of the munificence of the royal persons into whose hands this borough came; but no distinct marks of a corporation: There is no appointment of a select, or governing body; no form of government; no mode of admission; no qualification of members; no provision for the continuance of a corporate body. Though there may be some *indicia* of a corporation before 29 Eliz., it was not till that time that the borough was really incorporated: A common seal is not a true criterion of a corporation<sup>v</sup>; and in this case it appears that the same common seal was made use of by the governors of the church lands. It is said, that the very grant of lands, &c. to a flux body, amounts in law, to an incorporation of that body; since they cannot legally hold the lands, unless they are incorporated. This argument however will be found to be contradicted by facts; and, as applied to this case, it is founded upon an unwarrantable application of the modern law of corporations, to ancient times. It was not unusual, heretofore, for aggregate bodies of men, not incorporated, to act in a collective capacity. Madox says, "Many of the king's towns which were not corporate, as well as others which were corporate, were charged to pay the king yearly a ferm for their town. That is to say, towns not corporated might and did hold their town at ferm, in like manner as the corporated towns were (by the king's favor) wont to hold \*." Again, "In like manner the towns corporate and not corporate were liable, without any discernible difference, to pay their respective

Early charters, not of incorporation.

In ancient times, bodies not corporate might hold lands.

<sup>v</sup> 2 Lqd. 257

<sup>v</sup> *Firma burgi*, cap. 3. sect. 1.

aids, talliages, or other duties <sup>2</sup>." He also gives many instances of towna not incorporated, and of other aggregate bodies and communities of men not incorporated, being charged and sued in the same manner as corporations <sup>3</sup>. It therefore does not follow, that an ancient grant of lands, or of privileges, to a body aggregate, operated as an incorporation of that body, either wholly, or partially, for the purpose of rendering it capable of the enjoyment of that particular grant. Lord Coke makes the same exception with respect to the ancient practice. "The parishioners, or inhabitants, or *probi homines* of Dale, or churchwardens, are not capable to purchase lands, but goods they are, unless it were in ancient time, when such grants were allowed <sup>2</sup>."

Grants to  
the inhabi-  
tants,

paying scot  
and lot.

The next question therefore is, upon what description of persons were the privileges contained in the ancient charters, conferred? Namely, upon the burgesses. As it is clear, that in those times, there was no select body that could answer to that name, it must refer to the inhabitants at large; or rather to such of them, as were then talliated, and who afterwards were assessed to the payment of scot and lot. It appears, that some of these privileges are still enjoyed by the inhabitants at large: the profits of the land are still applied to the maintenance of the poor, which is a burden to be borne by the inhabitants. When therefore, the first writ of election of which we have any tradition, was executed in this borough, in the time of Edward the first, by whom, except by the inhabitants at large, could the election have been made? For, it is clear, that the select body, who now claim it, did not exist till many years afterwards; and that no select body, created afterwards, could legally acquire the right. Queen Elizabeth, by her charter,

<sup>2</sup> Ibid. cap. 4. sect. 1. and see cap. 12. c. 3.

<sup>3</sup> Cap. 5. Sect. 1—15. Sect. 39, he mentions the inquisition taken 22 R. 2. before Martin de Feters, the King's commissioner at Lestkeret, in the county of Cornwall, ante, Vol. i. p. 116. Lastly he mentions, f. 41, "the prosecutions or actions brought against the men of a hundred, by com-

mon law, or upon the statute of Winchester, for not raising of hue and cry, and also the fines, issues, and amercedments, usually set upon inhabitants of a town for trespass, and such other like cases." p. 12. he states the fee-farm of Liskeard, to have been assigned in dower to the widow of the Black Prince.

<sup>4</sup> Co. Litt. 3, a.

could

could neither directly, nor indirectly, alter it; nor is it, in fact, mentioned in that charter, which, however, professes to grant all corporate rights; from whence it follows, that it must have been at that time considered not to be a corporate right, but to be already in the hands of persons not incorporated, from whom it could not be taken. And it is remarkable that in the charter of Helleston, granted about the same time, (27 Eliz.) the right of election is expressly given, as a corporate right, to the corporate body<sup>a</sup>. This silence in the charter is consistent with the right of the inhabitants, and inconsistent with the right of the select body, who, being created by the charter, could only have derived from it, the privilege of electing members to parliament. The immediate object of Queen Elizabeth's charter is the order and government of the borough: with this view, certain corporate officers are appointed, to whom are entrusted judicial powers; and it is remarkable that both the mayor and the common council of nine, are directed to be chosen by the burgesses at large; but no provision whatever is made for choosing the members of the third body, namely, the burgesses inhabitants, neither is there any inchoate right existing by charter or prescription, by which a title to be admitted into that body can accrue; nor any limitation to the number of that body. These circumstances strengthen the opinion that this third integral part could consist of none other than the inhabitants of the borough; for there is no other means of accounting for the silence of the charter upon these points. But it appears from the evidence in the present case, that the select number have taken upon themselves to elect the members of this body; and that, without any regard to the place of their residence. This usurpation cannot be defended upon any ground; for they could not legally acquire such a power by a bye-law so inconsistent with the terms of their charter. In the case of the King against Head and others, freemen of Helleston<sup>b</sup>, it was determined, that the select body could

Charter of Elizabeth.

Cases of illegal bye-

<sup>a</sup> But Helleston is also a parliamentary borough by prescription, and sent members 26 Edw. 1. 4 Pryane, 995. according to Willis, 23 Edw. 1. See Not. Parl. Vol. 2. p. 70. Sep 2 Ld. Gl. 1. 1 Fra. 1. <sup>b</sup> 4 Burr. 2515, 2520.

laws, in restraint of the right of election.

not make a bye-law confining the election of freemen to themselves; "the common-council" (said Lord Mansfield) "could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body." So, in the case of the King against Spencer, a common-council-man of Maidstone, the court said, "You cannot change the right of the electors from one body to a different body, or intermix other persons with those who have the right in them." The other side therefore should shew by what power given them in the charter, the common-council are authorised to elect the burgesses. If the principles stated above are adhered to in cases where the interests of individuals are affected, much more should they prevail, where the public is concerned, whose rights, (especially those of a political nature) are not to be barred by adverse usage. And if the charter could, neither directly nor indirectly, alter the right of election, much less could a particular part of the corporation alter it, by a bye-law inconsistent with the charter, and least of all, by an usurpation, unwarranted even by such a bye-law. But the right of election being once vested in the inhabitants at large, not as a corporate, but as a personal right, it is immaterial to the present purpose to inquire how they were affected by the charter, or by the legal principles by which corporations are governed and upheld; since, if the inhabitants are the corporation, it belongs to them not as corporators, but as inhabitants; and if they are not corporators, it belongs to them by prescription, antecedently to, and independently of the corporation.

Q. El.'s charter granted to the inhabitants.

However, from considering the circumstances of the borough when Q. Elizabeth's charter was granted, the terms of that charter, and what has taken place since the grant of it, it will appear, that it was addressed to the inhabitants, and that it did actually comprise them.

The charter recites, that the burgesses and inhabitants of the borough have immemorially possessed many rights and

\* 3 Burr. 1827, 1840. and see R. v. Breton, mayor, and Jeyes, town-clerk of Northampton. And see 5 Co. 63. Maidstone, 4 Burr. 2204. and R. v.

privileges. It is clear, that there was then no select body; therefore, these words, 'burgesses and inhabitants,' must refer to the inhabitants at large. The inhabitants are incorporated. The charter further ordains, that the 9 common-council-men shall be chosen by the burgesses; and it appears in point of fact, that the inhabitants, at their first meeting to execute the charter, did chuse nine of themselves, into this office. Their first bye-law, that the nine chief inhabitants shall be reputed superior burgesses, amounts to a contemporaneous exposition of the statute. Moreover, a provision is made for the nomination of one candidate for the mayoralty, by the grand jury. It cannot be said that the grand jury was an existing body, or integral part of the corporation: they are chosen and sworn for a particular and temporary purpose: which purpose being answered, they return into the mass of inhabitants. By the same bye-law, fifteen inferior burgesses are named to be homagers on law days. It cannot be contended that this appointment amounted to any thing more than the selection of certain persons from the general body of the inhabitants, to be sworn for the performance of particular functions: yet it is under this pretext that the inhabitants at large have been excluded, and these selected persons have been erected into an integral body, called sworn freemen. The 'residue of the burgesses,' could be no others, than the inhabitants. The only distinction made among the inhabitants, is between those who are charged to the subsidy, and those who are not: The serjeant at mace is a corporate officer; and this office is served by the inhabitants. The right to be impleaded in their own courts, and not to be summoned as jurors out of the borough, belongs to them, and an anxiety is shewn to keep out strangers from the borough, to the prejudice of the inhabitants. It is immaterial, in this view of the case, whether or not any of the present inhabitants are in possession of their corporate rights by a formal admission: for the committee are to decide upon the abstract question of right, and not upon the title of any individuals. The question is not, whether A. or B. had a right to vote at a particular election, but what description of persons have a right to vote at all elections.

## Returns.

The language, and corporate form of the earlier returns afford but slight evidence in a case of this kind. In most boroughs where there has been an existing corporation, the returns have been corporate returns, where yet, the elections have been made by the inhabitants at large; as in the case of Windsor, 8 Dec. 1640<sup>d</sup>. There it appeared, that the returns had been made by the mayor, bailiffs, and burgeses, or by the mayor, bailiffs, and commonalty, in the reigns of Edw. 4. and H. 8., yet the right was resolved to be in the inhabitants at large. Similar returns were shewn, in the case of Pontefract<sup>e</sup>; yet the right was ultimately fixed in the inhabitants at large<sup>f</sup>. This irregularity might possibly arise from the incorrect expression, or from the mistaken construction of the St. 23 H. 6. c. 14. by which it is directed that the precept shall be sent to "every mayor and bailiff, or to the bailiffs or bailiff where no mayor is;" under which clause it was understood by many, that the chief officer of the corporation should in all cases execute the return, even where the right of election was not in the corporators<sup>g</sup>. One return therefore, that can be shewn, which is manifestly not a corporate return, outweighs any number that can be produced, with the names of the corporate officers attached to them. The return 1 & 2 P. & M. by the whole town and borough is made in the most large and popular terms; it is sealed, not by the corporate, but by a private seal; and clearly points to an election not by a select body, but by the inhabitants at large: and whatever objection may be made to the return of the mayor himself, it does not affect the other member who was returned together with him; and therefore that irregularity does not affect the argument. Moreover the number of signatures (45) affixed to the return in 2 W. & M. is inconsistent with the number of which the corporation (including only the capital burgeses, and the sworn burgeses) now consists.

<sup>d</sup> 1 Journ. 47.

<sup>e</sup> 1 Ld. Gl. 380. 1 Lud. 1.  
 1 Fra. 216. and see the cases cited by  
 Mr. Luders, 1 Vol. p. 15, & 16. and

2 Lud. 199. Glanv. 35.

<sup>f</sup> 27 Feb. 1793. 48 Jour. 297.

<sup>g</sup> See *ante*, Vol. 1. p. 417, 427.

It is not difficult to trace the progress of the usurpation Usurpation. by the select body. It appears to have been very early contemplated. In 1663, the number of inferior burgesses was 111, which probably comprised all the inhabitants of the town, who were talliated: this number was reduced, and the real inhabitants of the town were gradually and systematically defrauded of their privileges. In 1680 the resolution was made to keep secrets. The non-resident freemen appear to have been first introduced in the time of James the Second, who, when he restored the charter surrendered to Charles II, added the names of several noblemen to be burgesses of Liskeard. This charter, from what is now known of its contents, seems to have afforded the model of the usurpation now complained of, for it abolished the necessity of residence, and altered the constitution of the borough in other respects. In 1698 the name of freemen, (borrowed also from the charter of James) first occurs: in 1723 it was resolved not to admit any freemen without the consent of the mayor and capital burgesses: and finally, they have reduced the whole body of the burgesses inhabitants, to a select body of 15 non-resident persons, called, sworn freemen, of whose name, character, or office, no trace can be found in the charter, or elsewhere. The loss of so many of the ancient muniments, is at least a very suspicious circumstance; and it appears, from the parole evidence produced on the present occasion, that there remains even now the vestige of the ancient right, existing in reputation, and in the traditions that have descended from former times.

The case of Tewkesbury, 1797<sup>b</sup>, differs widely from the present, both as to the nature of the borough, and the foundation of the elective right. Tewkesbury  
1797. Tewkesbury is a borough in ancient demesne; but derived its elective franchise from the charter of James the First; and the dispute in 1797, turned upon the signification of the word *communitas*, in that charter.

<sup>b</sup> *Ante*, Vol. I. p. 146.

Presumption  
in favor of  
inhabitants.

It is submitted therefore, that the right of the inhabitants in a doubtful case, is entitled to be favored, as being that which the law will always presume, where there is no proof to the contrary: that in this case, they are entitled to the right, not under the charter of Elizabeth, but consistently with it; the charter being intended for their municipal government, and being addressed to them as inhabitants; that whatever changes may have taken place in their constitution as a corporation, and however those changes may have been ratified by time and long acquiescence as far as regards private titles and individual interests, yet in a parliamentary view the inhabitants paying scot and lot, (i. e. such as were talliated) still remain the legal electors, as they were before, and at the time of, the charter being granted. This is the proper tribunal in which such rights may be asserted: the court of Kings Bench guards corporate rights upon its own rules and principles; the elective franchise, which is not a corporate, but a political right, is not to be sought there, but in this court, where neither non-user, nor acquiescence, nor adverse possession, nor technical niceties, are permitted to prevail against a right proved to have once existed.

Right of  
election to  
be recovered  
in H. of C.

The committee will therefore by their present decision fix for ever the right of election in this borough; giving it either to the corporation concurrently with the inhabitants, or to the inhabitants at large, or to such of them as have tendered themselves to be admitted into the corporation. At all events, it is submitted, that the decision of the last committee cannot be suffered to remain, since by confining themselves to the word 'burgesses,' they have left the question who are the burgesses of Liskeard, still open.

Argument for the defending petitioners.

Arg. for the  
defending  
petitioners.

The fate of all boroughs whose right of election is not protected by an act of parliament, or by a last determination, is involved in the present question. After a search into very remote antiquity, no clear or distinct discovery having resulted therefrom, doubtful interpretations and conjectures are opposed to the usage of three centuries, and the committee are desired to presume in favor of what is called a common law right, unless all the difficulty which  
must



must necessarily occur in a subject of so intricate a nature as the rise and growth of a prescriptive corporation, during the course of several hundred years, is removed.

All the topics urged by the opposing petitioners, were in vain urged in the case of Poole, where many circumstances appeared in favour of the inhabitants which are wanting in this case<sup>1</sup>. In fact, nothing is more common than a charter addressed to the inhabitants of a town; but the effect of such a charter is not as is stated by the opposing petitioners, that all future inhabitants, for the time being, are *ipso facto*, corporators; but, that every existing inhabitant at the time the charter is granted, may, if he pleases, be admitted into the corporation; but neither is the corporate right conferred, at that time, upon the inhabitant without his consent; nor does the right to be admitted upon their application, continue in future times, to such as shall thereafter come to inhabit the borough. There is an authority in Brook's Abridgment, cited from the year book, 21 Edw. 4., to shew that a grant of incorporation may be addressed to inhabitants, but that the corporation must be continued by a regular election. "If the King grant to the inhabitants of the town of Dale, that they may elect a mayor, and then, that they shall implead and be impleaded by the name of the mayor and commonalty of D., now, this word 'inhabitants', is gone<sup>2</sup>."

Poole, 1775.

Incorporation of inhabitants,

The late King, in the 23d year of his reign, incorporated all the butchers who exercised their trade in London, or within two miles thereof; but it was not pretended, when that charter came under the discussion of the court of Common Pleas<sup>3</sup>, that every butcher who set up his trade within these limits, became a member of the company: although it was determined by the court, that he was bound by the company's bye-laws. In the case of the King against Dr. Aikew<sup>4</sup>, the charter of incorporation included

Strangers bound by bye-laws.

<sup>1</sup> 2 Ld. Gl. 223. *ante* Vol. i. p. 144.

<sup>2</sup> Bro. Abr. Tit. Corporations and capacities, pl. 65. Chippenham, *ante* Vol. i. p. 270. Malmesbury, *post*, appendix See 2 Ld. 236.

<sup>3</sup> The Butcher's Company v. Morey,

1 H. Bl. 371. and see 1 Salk. 192. Comp. 269.

<sup>4</sup> 4 Burr. 2186. and see R. v. Tate, 4 East, 337. case of Richmond in Yorkshire.

Usage.

Charter.

Quare.

'all other men of the same faculty within the city of London and seven miles about ;' but it was held that an individual physician practising in London, did not become *ipso facto* a corporator. The substance of the argument on the other side is, that the select body cannot legally have the right, because they cannot shew their own existence to be co-eval with the exercise of the right of election in the borough: but it belongs to the opposing petitioners to contradict the inference arising from an immemorial usage; and, by shewing the creation and origin of the select body, posterior to the representation of the borough in parliament, to prove, that there existed a time when the select body could not have elected the members. It is admitted, that no lapse of time can bar this inquiry, nor can any usage defend the pretensions of the select body, if this defect can be shewn in their title. Where there is no such proof, the legal title to the franchise is indicated by the long possession of it. If it is insisted that no royal charter had been granted to this borough at the time of the first exercise of the elective franchise, and therefore, that no corporation could have existed there, at that time: it is answered, first, that it does not appear impossible, from any part of the evidence, but that a royal charter might have been granted, while the borough was in the hands of the Earls of Cornwall. It is clear, at least, that they were in some respect the subjects of a royal grant; otherwise, they could not have acquired the right of election<sup>a</sup>. Secondly, that charters of incorporation were wont, in those times, to be granted by subjects; (and it is said, even now, that the king may grant to a subject the power of erecting corporations<sup>c</sup>.) There are instances of such charters being granted by the Earls and Dukes of Cornwall, and by the Bishops of Durham<sup>d</sup>. In this case, the grants by the Earls of Cornwall are recognized and confirmed by the succeeding sovereigns. And it is observable, that the

<sup>a</sup> Mr. Willis writes, that the first express clause entitling any borough to send members to Parliament, was in the charter of Wenlock, 8 Edw. 4. Pref. to Vol. i. p. xxxviii. And see

*ante*, Vol. i. p. 55.

<sup>c</sup> 1 Bl. Comm. 474.

<sup>d</sup> Helleston. Brady, 92. Trum, ib.

93. Launceston, ib. 94. Saltash, ib.

97. Plympton, ib. 98.

boroughs of Launceston and Helleston, to which a reference is made in the charter of the Earl of Cornwall, were corporations by prescription; that each of those boroughs have sent members to parliament from 26 Edw. 1.; and that the right of election, in each, belongs to the corporation. But it is submitted, that the enjoyment of lands from time immemorial, by the burgesses of Liskeard, is a decisive proof that they have been, from time immemorial, a corporation. They had besides, their common seal<sup>4</sup>, their select body, their forms of election, admission, and swearing in of burgesses, and their corporate acts, long before the charter of Elizabeth. There are no technical words necessary to make a corporation: when the privileges that are granted cannot be enjoyed but in a corporate capacity, the incorporation attaches, as a matter of course. The word *homines*, however, in an ancient grant, has been held to be exclusively applicable to freemen<sup>5</sup>; and the charter of Queen Elizabeth, in its recital, takes a view of the whole history of the borough, and clearly shews that it had been incorporated from the earliest date. It is therefore submitted upon this part of the case, that there is sufficient ground to presume a royal charter of incorporation, if such a charter is necessary to the existence of the corporation<sup>6</sup>; or at least, to presume the consent of the crown to the incorporation by a subject: and further, that without having recourse to presumption, it distinctly appears that a corporation existed before the time of Edward the first: and consequently, that the first writ of election might have been, and in all probability was, addressed to, and executed by, that corporation.

Badges of  
incorporation.

The distinction between the burgesses and the other inhabitants, appears in every part of the book of constitutions; the entries in which are unintelligible, unless that distinction be constantly attended to. The admission of persons to their freedom never depended upon any inchoate right, but upon the choice of the select body: but they never would have chosen an inhabitant to be a burgess, if

<sup>4</sup> S. v. 2 Lud. 237.

<sup>5</sup> 1 H. Bl. 212.

<sup>6</sup> See *Lady Stafford v. Llewellyn*,

*Skinner*, 78. an act of Parliament presumed, where nothing else could support the possession.

Corporations  
may bind  
strangers by  
their bye-  
laws.

Poor's rates.

Returns.

he were so already; nor would it be possible to disfranchise an inhabitant, if the mere inhabitancy made him a freeman. The observation made on the other side, that the charter prescribes no mode of election or of admission of new members, shews, that there was already an existing body, and certain known forms of admission and election, which it was not meant to alter, and which therefore were passed over unnoticed. It is admitted that many of the constitutions affect the inhabitants at large: but nothing is more clear, than that the corporation of all towns or places may have the power of making regulations which bind those who dwell therein, although not members of the corporation. It is said, that the inhabitants virtually enjoy the lands, because they are exempted from maintaining the poor, who are supported from the profits of those lands: but it is proved, that the inhabitants of that part of the borough which lies in the parish of St. Clear, pay to the poor's rate for that parish. This fact destroys the theory contended for on the other side: for if these lands belonged of right to the inhabitants, the benefit arising therefrom would have been extended to all of them.

The language of the returns strongly enforces the claim of the present corporation. The return in the time of Edw. 4. is in the name of the mayor and burgesses, and they continue in the same form, with but few exceptions, till the present time. Sometimes the common seal is used; and sometimes a private seal: this difference is immaterial, since an election is not a corporate act<sup>1</sup>. The return 4 & 5 P. & M. is said to be made by the whole borough, omitting the mayor, for the purpose, probably, of avoiding the appearance of the mayor making a return of himself. But the principal observation arising from the whole of the returns is, that there is not one instance from which the inhabitants can be unequivocally proved to have exercised the right: neither have their pretensions been ever asserted, although there have not been wanting contests in the borough, where doubtless, their claims would have been preferred, had any such been supposed to exist. With respect to the

<sup>1</sup> Vol. i. p. 356, 358.

question, who may claim to be the corporators at Liskeard? It might easily be shewn, from every part of the evidence in this case, and from the whole constitution of the borough, that there never has been any inchoate right to the freedom of the borough; and that still less has it ever been considered that inhabitancy in the borough gave that right: but it is submitted, that the question is to be determined by another tribunal, and not by this. If the inhabitants are entitled to be members of the corporation by virtue of the charter of Elizabeth, the circumstance of no inhabitant having yet preferred his claim, will not be a bar to the claim of the present inhabitants, in the courts of common law. Those courts only, have jurisdiction to try who are the legal corporators: whether they have conformed to their charter: whether they are liable to be removed by *quo warranta*; or whether they may be compelled to admit into their number persons of a particular description. This committee is to decide whether the right of election be in the corporation, or not; they are not called upon to fix the right of admission into the corporation. In cases of corporate questions the House of Commons expects that application shall have been made to the courts of common law, and that the proper measures shall have been duly pursued, in order to de-vest assumed rights, or to enforce rejected claims. Where that has not been done, the House affords no relief; where it has been done, the decisions of courts of justice are received as conclusive authorities upon the question. But these petitioners cannot expect to be permitted, by their own laches, to expose the committee to the risk of deciding that the inhabitants are corporators for this purpose, when the court of King's Bench may hereafter decide, that they are corporators to no other purposes: and it is a dangerous doctrine to maintain, that it is the duty of the committee, upon these occasions, to overlook all technical distinctions, and to consider men as corporators, with respect to the right of election, who neither in the common acceptation of the word, nor in the legal sense of it, are at all entitled

Q. who are corporators to be determined elsewhere.

✓ See ante Vol. i. 75.

✓ See ante Vol. i. p. 479. Vol. ii. p. 229.

to be so considered. The plain rule is; that if a man claims to vote as a freeman, he must shew himself to be a freeman. If he has the franchise, he has every thing which belongs to it: if he has it not, neither has he any private or public right which flows from it.

Derision and  
report.

On the 11th of May 1804, the chairman reported, 'that the parties having been required to deliver in to the clerk of the committee statements in writing of the right of election for which they respectively contended;

' In consequence thereof, the counsel for the petitioners Samuel Mitchell, Josiah Abraham, William Wallish, and others; and also, for the petitioner Joseph Childs, delivered in a statement as follows: " That the right of election, for the borough of Liskeard, &c. is in the inhabitants of the borough of L. paying, or liable to pay, scot and lot:

' That the counsel for the petitioners, the Hon. W. Eliot, John Carthew, John Eliot, Richard Taunton, M. D. and others, delivered in a statement as follows:

" That the right of election for the borough of Liskeard, &c. is in the mayor and burgesses of the said borough:

' That upon the statement delivered in by the counsel for the first-mentioned petitioners, the said committee have determined,

' That the right of election, as set forth in the said statement, is not the right of election for the borough of Liskeard, in the county of Cornwall:

' And also, that the said committee have determined, That the right of election, for the said borough of Liskeard, is not in the inhabitants, householders, resident \*:

' That upon the statement delivered in by the counsel for the last-mentioned petitioners, the said committee have determined,

' That the right of election, as set forth in the said statement, is the right of election for the said borough of Liskeard.'

\* N. B. The committee negative a right not contended for by any of the parties.

These determinations were ordered to be entered in the Journals.

#### Incidental points.

A question arose very early in the trial, whether the counsel for Mr. Childs should be heard separately from the counsel for Mr. Mitchell and others. The counsel for the defending petitioners objected, that Mr. Mitchell and Mr. Childs were virtually the same party, since they contended for the same right of election. In answer, the case of Camelford 1796 was cited, where there were two petitions, in which the same right of election was contended for, and the petitioners were heard separately; and the last case of Liskeard, where Mr. Mackintosh was heard for the petitioning electors, although their petition was in the same terms with that of the petitioning candidates: and it was said, that it might open a door to collusive petitions, if it was held, that when one set of petitioners had been heard, others, who petitioned upon the same ground, should not be allowed to assert their right. In reply it was said, that the rule of the House, that only two counsel should be heard on one side, was invariable; and that there was no necessity upon this occasion to make an exception to it: that the rule applied to those cases where the points in issue were the same, however various or numerous the parties might be, who disputed them: that in the cases cited, the interests of the parties were essentially different; since the candidates only contended for a particular return; the electors, for the permanent right of election; but even in those cases, the committees heard but one reply, on the part of all the petitioners: but that here, the different opposing petitioners were, in all respects, in the same predicament: they supported the same right of election, and pursued exactly the same objects, both in regard of what they proposed, and of what they resisted: lastly that there was no just ground for apprehending any prejudice from a collusive petition; it being competent to the committee, in such a case, to relax the rule, and to hear the other petitioners.

The committee determined, that Mr. Pell should not be heard.

Petitioners  
not to be  
heard separately, where  
the matter of the petitions is the same.  
Camelford,  
1796.

Hearlay of  
an interested  
person, in-  
admissible.

A witness was called on the part of the opposing petitioners, to prove what he had heard said by one Lampen, (who had died some years ago at a great age,) respecting the right of election. Lampen had been an inhabitant of the borough, but not a freeman. This evidence was objected to, 1. because there had been no foundation laid for such evidence: it was said, that no evidence could be received of any right, by reputation, until some fact were first shewn, of the exercise of that right: as for instance, that the customary mode of the descent of land in a particular manor could not be shewn, till it had been proved that some person had at one time held, or taken an estate in the manor by such descent: 2. that the evidence proposed, was the declaration of a person directly interested; and that he would have been an inadmissible witness, if alive: that a rule had been adopted by committees, to suffer a voter to be called who united in himself both the rights which were the subjects of dispute, because then the only question which affected him, was, whether he should communicate the right with more, or with fewer persons, which was not held sufficient to disqualify a witness upon the ground of interest; but that they never received one who had no other claim, except that which would accrue to him by his own testimony: and the decision in the late case of Weymouth was cited, as an authority<sup>a</sup>.

It was answered, 1. that the very use of the word 'inhabitants' in the charter and in the constitutions, laid the foundation for admitting this evidence: 2. that the declaration was admissible, inasmuch as it was made at a time when the right of election was not in dispute, and when consequently he who made it, could have no inducement to speak falsely; and it was said that declarations of interested persons, namely parishioners, respecting the boundaries of parishes, had been received by Lord Mansfield in similar circumstances<sup>a</sup>.

The

<sup>a</sup> See *ante*, p. 225.

<sup>b</sup> *Ante*, p. 327. and see the cases referred to there.

<sup>c</sup> On the trial of a presentment of a

road in the parish of Hammersmith, Lord Mansfield admitted in evidence the declarations of an aged person, an inhabitant of H. (since deceased)<sup>a</sup>



The committee determined that the evidence should not be received.

A witness having stated that her father, who had been mayor of the borough, had died 43 years ago, and that she remembered him sitting with some of his friends at table, and drinking "the health of Mr. Richard Eliot, of Port Eliot, and scot and lot," was asked the following question; "Did you hear your father, and those who were with him, state, upon what right Mr. Richard Eliot came in?" (Mr. Eliot had been chosen Member of Parliament for Liskeard, A. D. ) This question was objected to, as not being matter of reputation as to a general right, but evidence of a particular fact, which could not be proved by reputation; as in a question respecting a right of way, in which general reputation is good evidence, but the fact of a particular person having used the way, cannot be proved by hearsay. It was answered that the question amounted to no more than an enquiry who voted at former elections. The committee determined, that the question should not be put.

Hearsay of a particular fact, inadmissible.

to the boundaries of the parish; because they had been made when there was no question, or dispute. R. v. Inh. of Hammersmith, 1776. Peake's Law of Evidence, Ed. 1804. p. xxiii.

#### NOTE (A), from p. 290.

Tertia pars parentium de anno regni regis Ricardi Secundi, 1377.  
primo. M. 25.

De confirmatione } Rex omnibus ad quos, &c. salutem Inspexi-  
pro burgensibus } mus cartam confirmationis domini Edwardi  
de Helleston. } nuper regis Angliæ avi nostri in hæc verba Edw. 3.  
Edouardus Dei gratia rex Angliæ dominus Hiberniæ et dux Aquitaniæ archiepiscopis episcopis abbatibus prioribus comitibus baronibus justiciariis vicecomitibus præpositis ministris et omnibus ballivis et fidelibus suis salutem Inspeimus cartam celebris memorie domini Johannis quondam regis Angliæ progenitoris nostri in hæc verba Johannes Dei gratia rex Angliæ dominus Hiberniæ Joh.  
Z 2 dux

dex Normanniæ et Aquitanie comes Andegavie archiepiscopis episcopis abbatibus comitibus baronibus iusticiariis vicecomitibus et omnibus ballivis et fidelibus suis salutem Sciatis nos concessisse et presenti carta nostra confirmasse quod burgus noster de Helleston sit liber burgus et quod burgenfes nostri de eadem villa habeant gildam mercatoriam et quietanciam per totam terram nostram de theolonio pontagio passagio stallagio & sollagio salvis in omnibus libertatibus civitatis London Concedimus etiam iis quod non placent nisi infra burgum suum de rebus vel tenuris pertinentibus ad villam suam præterquam de placitis ad coronam nostram pertinentibus et placitis de terris forinsecis Volumus etiam quod habeant omnes alias libertates et liberas consuetudines quas habuerunt burgenfes nostri de castello de Lanstave-ton tempore regis Henrici patris nostri ita quod nullus burgensium prædictorum nisi residens fuerit in prædicta villa de Helleston has habebit libertates huius testibus, &c. Data per manum Will. archidiaconi apud Graneburgum xv die Aprilis anno regni nostri secundo Inspeimus etiam cartam domini Ricardi quondam regis Romanorum semper augusti in hæc verba Ricardus Dei gratia Romanorum rex semper augustus omnibus ad quos præsens scriptum pervenerit salutem Sciatis nos concessisse et presenti carta nostra confirmasse pro nobis et heredibus nostris burgensibus nostris de Heuleston quod burgus noster de Heuleston liber burgus sit et quod burgenfes nostri de eadem villa habeant gildam mercatoriam et quietanciam per totum comitatum nostrum Cornubiæ de theolonio pontagio passagio lastagio sollagio et stallagio Concessimus etiam eis pro nobis et heredibus nostris quod non placent nisi infra burgum suum de rebus vel tenuris pertinentibus ad villam suam præterquam de placitis ad coronam domini regis pertinentibus et placitis de terris forinsecis Concessimus etiam eis pro nobis et heredibus nostris villam suam cum pertinentiis et cum molendinis extra villam et cum aqua de Choloze fluente ad eadem molendina et cum omnibus assamentis ejusdem aquæ sine aliquorum nocumento et quod possint erigere alia molendina super eandem aquam si viderint eis expedire sine alicujus nocumento ut prædictum est et cum triginta tribus acris terræ assis in eadem villa de villenagio nostro per Odonem filium Frawin quondam firmarium de Heuleston. Habendum et tenendum ad feodi firmam de nobis et heredibus nostris eis et heredibus suis reddendo inde annuatim nobis et heredibus nostris per manus suas duodecim libras argenti ad duos anni terminos videlicet ad Pascham sex libras et ad festum sancti Michaelis sex libras Concessimus etiam eis pratum nostrum subtus villam de Helleston

Helleston Habendum et tenendum eis et heredibus suis de nobis et heredibus nostris pro annuis viginti et sex solidis et octo denariis ad duos anni terminos nobis et heredibus nostris reddendis videlicet ad Pascham tresdecim solidis et quatuor denariis et ad festum sancti Michaelis tresdecim solidis et quatuor denariis Quare volumus et firmiter præcipimus quod prædicti burgenſes et eorum heredes habeant et teneant prædictam villam cum pertinentiis suis ad feodi firmam bene et in pace libere quiete et integre cum prædictis molendinis et omnibus libertatibus et liberis consuetudinibus suis usitatis et consuetis ad liberum burgum suum et ad prædicta molendina pertinentibus sicut prædictum est Concessimus etiam eis pro nobis et heredibus nostris quod nullus vicecomes aut alius ballivus noster in aliquo se intromittat de aliquo placito vel querela vel occasione vel aliqua re alia ad prædictum burgum pertinente salvo placitis coronæ quæ tamen attachiari debent per eosdem burgenſes usque ad adventum iusticiariorum Et quod licet eis sine forinſeco ballivo distringere omnes burgenſes suos ubicumque sint sive in villa sive extra villam pro debito nostro vel heredum nostrorum Quod ut ratum perseveret et inconcussum præſenti scripto et sigilli nostri impressione illud confirmavimus hiis testibus, &c. Data Lanceneton sexto die Januarii indictione tertia regni nostri tertio Nos autem concessiones et confirmationes prædictas ratas habentes et gratas eas pro nobis et heredibus nostris quantum in nobis est dilectis nobis nunc burgenſibus burgi prædicti et eorum heredibus et successoribus in perpetuum concedimus et confirmamus sicut cartæ prædictæ rationabiliter testantur et prout iidem burgenſes ac eorum antecessores villam molendina terras et tenementa prædicta hætenus rationabiliter tenuerant et libertatibus et quietanciis prædictis rationabiliter usi sunt et gaviſi Hiis testibus, &c. Data per manum nostram apud Bothevill sexto die Decembris anno regni nostri decimo. Nos autem concessiones et confirmationes prædictas ratas habentes et gratas eas pro nobis et heredibus nostris quantum in nobis est acceptamus approbamus ratificamus et dilectis nobis nunc burgenſibus burgi prædicti et eorum heredibus et successoribus in perpetuum concedimus et confirmamus sicut cartæ prædictæ rationabiliter testantur et prout iidem burgenſes ac eorum antecessores villam molendina terras et tenementa prædicta hætenus rationabiliter tenuerunt et libertatibus et quietanciis prædictis rationabiliter usi sunt et gaviſi. In cuius, &c. Teste rege apud Westmonasterium duodecimo die Februarii.

Edw. 3.

Joh.

1383:

Tertia pars patentium de anno regni regis Ricardi Secundi sexto.  
M. 16.

De confirma- } Rex omnibus ad quos, &c. salutem Inspecimus  
tione. } litteras patentes Ricardi quondam comitis Pictaviæ  
et Cornubiæ in hæc verba Ricardus comes Pictaviæ &  
Cornubiæ omnibus hominibus ballivis & fidelibus suis salutem  
Sciatis quod nos concessimus & dedimus & hac præfenti carta  
nostra confirmavimus quod burgum nostrum de Duneheved libe-  
rum sit et burgenſes noſtri de eodem burgo et omnes homines ad  
libertates dicti burgi pertinentes ubicumque fuerint et quod quieti  
ſint per totam terram noſtram de pontagio de aſtalagio de ſuillagio  
et omnibus aliis conſuetudinibus Conceſſimus etiam ipſis et heredi-  
bus ſuis pro nobis & heredibus noſtris electionem ſuam de præpo-  
ſitis ſuis et reſpondere de firma ipſius burgi ad Paſcham et in feſto  
ſancti Michaelis annuatim nobis vel ballivis noſtris ſcilicet de cen-  
tum ſolidis et prioratui ſancti Stephani de Lanſt. de ſexaginta et  
quinque ſolidis et decem denariis et leproſis ſancti Leonardi de  
Lanſt. de centum ſolidis de eleemoſyna noſtra Ita tamen quod ſi  
præpoſiti per eos electi in aliquo evidenter deliquerint vel præ-  
ſumpſerint hæc ipſum ſecundum delictum et præſumptionem illam  
emendabunt Conceſſimus etiam ipſis et heredibus ſuis pro nobis et  
heredibus noſtris quod non placent niſi infra burgum ſuum præ-  
nominatum de placitis vel rebus quibuſcumque pertinentibus ad  
burgum ſuum niſi de placitis ad coronam domini regis pertinenti-  
bus Conceſſimus etiam ipſis et heredibus ſuis pro nobis et he-  
redibus noſtris habere octo comitatus per annum in burgo ſuo præ-  
nominato incipiendo a proximo comitatu poſt clauſum Paſchæ  
uſque ad finem octo comitatum proximorum ſequentium Concef-  
ſimus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris  
ut habeant et teneant unam placeam in eodem burgo ad quandam  
aulam gillatoriam exigendam tenendam de nobis et heredibus  
noſtris ubi decenſius et honorabilius providerint per unam libram  
piperis annuatim reddendam in feſto ſancti Michaelis pro omni  
ſervitio querela et exactiōe Conceſſimus etiam ipſis et heredibus  
ſuis pro nobis et heredibus noſtris quando aliquis ballivorum noſ-  
trorum priſam fecerit de cereviſia in caſtellum quod non tenetur  
habere niſi primam bikam de uno obelo minus quam alibi vendita  
fuerit ſecundum quod aſſiſa facta fuerit per burgenſes Si autem  
plusquam unam bikam habere vel capere voluerit mercabitur ſin-  
gula et quantum ceperit ſicut alibi potuerunt venundari Conceſſi-  
mus etiam ipſis et heredibus ſuis pro nobis et heredibus noſtris  
quod

quod nulles vicecomes aut alius ballivus noster trahat eos in placitum nisi iuste et rationabiliter et sine inconvulsionem Concessimus etiam ipsis et heredibus suis pro nobis et heredibus nostris quod nullus vicecomes aut alius ballivus noster emat vel capiat pro voluntate sua aliquid in prænominato burgo nisi de bona voluntate et spontaneo consensu venditoris ipsius mercaturæ Concessimus etiam ipsis et heredibus suis pro nobis et heredibus nostris quod non gyllent cum comitatu de aliquo servitio vel tallagio et labore et quod non tallientur per nos vel heredes nostros [nisi] ad tempus quando dominus rex omnes burgos suos per Angliam tallia [verit] sit ut hæc concessio et donatio et confirmatio nostra rata et stabilis perpetuis temporibus permaneat ad perpetuam confirmationem hanc cartam nostram prænominatis burgenfibus nostris sigilli nostri impressione confirmavimus Hiis testibus, &c. Nos autem omnes & singulas donationem concessionem libertates et consuetudines prædictas et omnia alia in dicta carta contenta rata habentes et grata ea pro nobis et heredibus nostris quantum in nobis est acceptamus ratificamus et approbamus et ea omnia et singula dilectis burgenfibus nostris liberi burgi nostri prædicti et eorum heredibus & successoribus burgenfibus ejusdem burgi pro nobis & heredibus nostris quantum in nobis est concedimus et confirmamus sicut carta prædicta rationaliter testatur et prout ipsi et eorum antecessores et prædecessores burgenfenses ejusdem burgi libertatibus quietanciis & consuetudinibus prædictis rationabiliter usi sunt et gavisii. In cujus, &c. Teste rege apud Westmonasterium secundo die Maii.

Pro quinque Marcis solutis in Hansperio.

## CASE L.

### THE COUNTY OF STIRLING.

**I**N this case, the petitioner, Sir Robert Abercromby, K. B. producing no evidence in support of his petition<sup>a</sup>, the sitting member, the Hon. Charles Elphinstone Fleming, was reported to be duly-elected, 3 May, 1804.

<sup>a</sup> Presented, 30 Nov. 1802, renewed 28 Nov. 1803.

## CASE LI.

### THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 14th of May 1804, and consisted of the following Members :

Rt. Hon. Geo. Rose, <i>Chairman</i> .	Henry Holland, Esq.
Cha. Chaplin, Esq.	William Odell, Esq.
Visc. Dunlo.	Robert Holt Leigh, Esq.
Peter Patten, Esq.	Richard Ellison, Esq.
John Scudamore, Esq.	William Burroughs, Esq. <i>Nominee</i>
Edmund Bastard, Esq.	for Mr. Huskisson.
Henry Howard, Esq.	Hon. Charles Hope, appointed by the
Manasseh Lopez, Esq.	first 13 <sup>a</sup> .
Henry Bankes, Esq.	

Petitioner : William Huskisson, Esq.

Counsel for the petitioner ; Mr. Plumer ; Mr. Serjt. Lens ; in the absence of either, Mr. Hobhouse.

Counsel for the Under-sheriff : Mr. Serjt. Praed ; Mr. Pell.

Mr. Huskisson's petition.

THE petition of Mr. Huskisson<sup>b</sup> stated the decision of the committee 9 Mar. 1803, upon the right of election ; that the mayor is the legal returning officer of the borough : that the under sheriff, 4 Mar. 1804, duly sent his precept for the election of a burghers to the mayor, who thereupon duly held the election, and returned the petitioner, by an indenture dated the 9 Mar. and annexed to the precept : but that notwithstanding, the sheriff, contrary to his duty, and wilfully and corruptly, to deprive the petitioner of representing the said borough, had annexed in his return to the writ a second indenture of return of Mr. T. Sheridan. The petition was ordered to lie upon the table ; and it was ordered that the clerk of the crown should attend the House on the morrow, with the

<sup>a</sup> There being no party before the House opposing the petition ; See ft.

c. 42. f. 6.

28 G. 3. c. 52. f. 14. ft. 11 G. 3.

<sup>b</sup> Presented, 27 Mar. 1804.

said

said return. On that day a petition of Mr. Henry Burgefs was read, stating that a petition had been presented complaining of a transaction, and stating gross corruption therein, in which transaction the petitioner conceived his character, together with those of Mr. Childs, and of the under-sheriff, to be materially implicated: the petitioner proceeded to disclaim all improper motives, and to justify his own conduct, and that of Mr. Childs; and relied on the justice of the House, that no proceedings might be had injurious to these persons, without affording them an opportunity of defending themselves. This petition was also ordered to lie on the table. The deputy clerk of the crown attending, the writ, the indenture, and the two returns, were read: and the st. 10 G. 3. c. 16. and the petition of Mr. Huskisson being again read, that petition was ordered to be taken into consideration on Monday 9 April.

Petition in  
defence of  
the under-  
sheriff.

Illegal re-  
turns.

28 Mar. Mr. Sheridan petitioned the House upon the merits of the election, (see the next case,) and this petition was ordered to be taken into consideration 23 Apr. The Speaker, 29 Mar. acquainted the House, that he had received a declaration in writing from Mr. Sheridan, stating, that he did not intend to defend his return<sup>c</sup>. It was then moved, that the order of the day for taking Mr. Huskisson's petition into consideration should be discharged: a debate arose upon this motion, which was adjourned to 5 April, when the order was discharged, and a new order made for the petition to be considered 3 May. The consideration of it was afterwards deferred, till 14 May.

Mr. S. stan-  
don: his re-  
turn.

The last determination as to the right of election was read from the entry in the Journals, 10 Mar. 1803<sup>d</sup>. The facts of the case, as they appeared from the evidence, were shortly these. The precept for the election was addressed by Mr. Dayman, the under-sheriff, to Mr. Carthew, the mayor of the borough, and the receipt of it by Mr. C. was attested by Mr. Childs, the agent of

Right of  
election.  
Facts of the  
case.

<sup>c</sup> See st. 28 G. 3. c. 52. s. 2. 4.

<sup>d</sup> *Ann.*, Vol. i. p. 144.

*Ann.*, Vol. i. p. 527.

to subjoin the precedents and parliamentary authorities cited on each side.

Cases cited  
by the peti-  
tioner.

Legal re-  
turns.

Bletching-  
ley.

Northamp-  
ton.

The counsel for the petitioner referred to the following authorities, to shew, with what degree of jealousy the House of Commons watch the proceedings of sheriffs, returning officers, and others who have any concern with returns to Parliament: and that many cases have been considered by them as the subjects of reprehension and punishment, where it did not appear that the offenders had acted partially, or corruptly, or from a bad design.

First, the case of Bletchingley, 1623. Sir Myles Fleetwood and Mr. Hayward were duly chosen by the burgage holders on the 22d Jan. the day appointed for the election; and they were returned to the sheriff by indenture accordingly. On the 8th Feb. the bailiff of the borough proclaimed, that on the next day, the burgage holders, and all the rest of the inhabitants should meet, to elect burgeses. Thirty of the inhabitants met, and chose Sir Myles Fleetwood and Mr. Lovell, and sealed an indenture between themselves and the sheriff, which indenture was delivered by Lovell himself into the crown-office in Chancery, without the sheriff's consent, who never sealed a counterpart thereof, nor ever accepted it. The House ordered, that Mr. Lovell should, for such his offence, be committed prisoner to the tower of London, during the pleasure of the House; and not to be enlarged till he made his submission, and acknowledged his fault upon his knees at the bar of the House; and that he should not be elected for the said borough (*hâc vice*) upon the new writ which was to go forth to choose a new burgeses, in the place of the said Sir M. F<sup>e</sup>.

Northampton, 11 Nov. 1678. Mr. Montague complained of an undue return made by the sheriff of Sir William Temple. It appeared, that the precept from the sheriff had been directed to the mayor and justices of the borough, and that the indenture annexed to the writ, whereby Sir W. T. was returned to serve for the said borough, was not



signed by the mayor, nor the seal of the corporation fixed thereto; and that the indenture, whereby Mr. Montague was returned, was signed by the mayor, and the seal of the corporation fixed thereto; and the same was annexed to the precept from the sheriff. The House after having resolved that the return of Sir W. T. was insufficient, and that the return of Mr. Montague ought to be annexed to the writ, ordered, that the high sheriff should be committed to the custody of the serjeant at arms<sup>2</sup>.

Minchhead, 9 Jan. 1721. 2. The return was read, which was signed by several of the burgessees of the borough: and also the precept of the sheriff, directed to the burgessees and electors of the said borough; but there was not any indorsement on the back of the said precept. John Thomas and John Floyd, constables of the said borough, were called in, and delivered in the indenture of return, which was by them tendered to the high sheriff of the county of Somerset, after the late election of a burgesse. The resolution of the House 13 Jan. 1717 was read, by which it had been resolved, that the constables of Minchhead are the proper officers to whom the precept for electing burgessees to serve in parliament for the said borough ought to be delivered, and to whom the execution of such precept did belong. It was then ordered, that the indenture signed by John Vicary and Joseph Sherry, and other burgessees of the borough, should be taken off from the file; that the indenture delivered in by the constables should be annexed to the writ of election; and that John Vicary and Joseph Sherry, having presumed to act as returning officer at the late election, were guilty of a high crime and misdemeanor, and should be taken into custody of the serjeant at arms<sup>3</sup>. This matter was taken into further consideration of the House, 23 Jan. 1721-2<sup>1</sup>, and Mr. Day, the under-sheriff, was called in and examined. He delivered in the receipt taken by him for the precept, which he delivered to John Vicary and Joseph Sherry, as returning officers for the borough of Minchhead. After reading part

<sup>2</sup> 9 Journ. 537.

after a division; ayes 72. noes 64.

<sup>3</sup> 19 Journ. 795, this was resolved

19 Journ. 725.

of stat. 7 & 8 W. 3. c. 25. it was resolved, "that — Day, late under-sheriff of the county of Somerset, having delivered the sheriff's precept for electing a burghess to serve in parliament for the borough of Minehead to John Vicary and Joseph Sherry, two of the burghesses of the said borough, but not constables thereof, is guilty of a breach of trust, and contempt of the authority of this House." And he was ordered into the custody of the serjeant at arms.

Kilrenny.

Kilrenny, &c. 18 Jan. 1722-3. "Resolved, that Robert Hay, of Naughton, sheriff depute for the shire of Fife, having accepted, and returned to the clerk of the crown in Chancery, an indenture of return of a burghess to serve in this present parliament for the district of burghs of Kilrenny, Anstruther Easter, Anstruther Wester, Pittenweem, and Crail, the said indenture of return not being signed by the common clerk of the presiding burgh of the said district of burghs, has acted arbitrarily and illegally, in defiance of the laws of this realm, and in breach of the privilege of this House."

In the Journal of the same day, are resolutions against Hugh Baillie, clerk in Inverness, and George Ireland, common clerk of the burgh of Kinghorn, for presuming to act as returning officers; and an order for their commitment into the custody of the serjeant at arms.

Inverness.

Inverness, 22 Feb. 1722-3. A resolution (of a similar import with that cited above, in the case of Kilrenny) was made, against Robert Gordon, of Haughes, for accepting an illegal return for the district of burghs of Inverness, Nairn, Forres, and Fortrose; and an order for his commitment.

Coventry.

Coventry, 6 Nov. 1780. "The sheriffs made a special return, why they had not returned two citizens, certifying, that they were impeded in the execution of the writ, and that the election was prevented by riots. 15 Mar. 1781, the sheriffs were heard in their defence; and it was resolved, 'that it appears to this House, that, at the last general election of citizens to serve in parliament for the city of Coventry, J. N. and T. B. the sheriffs, who were the

\* 20 Jour. 92, 113.

† 20 Jour. 91, 146.

returning officers at the said election, were not prevented by riots, or otherwise, from making a return of members to serve in parliament for the said city.' And it was resolved, *nem. con.* ' that the said J. N. and T. B. late sheriffs of the said city of Coventry, not having made any return of members to serve in parliament at the last general election for the said city, are thereby guilty of a high violation of the law, and a gross breach of the privileges of this House.' And for this offence they were ordered to be committed to his majesty's gaol of Newgate<sup>m</sup>.

It was observed, in excuse for Mr. Dayman's conduct, that the return of Mr. Sheridan was a more legal and proper return than that of Mr. Huskisson; since it pursued the terms of the last determination, and purported to be made by the mayor and burgesses; whereas that of Mr. Huskisson purported to be made by the mayor, capital, and free burgesses: and that the sheriff would not only have been justified in refusing that return, but was bound to refuse it, by the terms of the stat. 7 & 8 W. 3. c. 7. s. 1. which forbids the return of any person contrary to the last determination of the House of Commons: that the right of election was, at the time of the election, under appeal in the House<sup>n</sup>, and if the appeal had been determined in favor of the inhabitants paying scot and lot, Mr. Sheridan, who had a majority of them in his favor, would have been entitled to the seat; that consequently, he had a right to tender the return to the sheriff to be executed; that if the appeal had been determined in favor of the petitioners appellants, this very return would have been accepted by the House of Commons, and annexed to the precept, instead of the return of Mr. Huskisson. For this was cited the case of Helleston, 2 Ld. Gl. 16. The precept was directed to, and executed by the mayor of the new corporation, and Lord Carmarthen and Mr. Owen were returned by him. Six of the old corporation proceeded to make another election by themselves, at which Richard Johns (one of them) acted as presiding officer, and made a return of Mr. Yorke and Mr. Cust.

Defence of  
the under-  
sheriff.

Helleston.

<sup>m</sup> 1 Heyw. 376, 377. 38 Journ. 8.

<sup>n</sup> See *supra*, p. 275.

The sheriff annexed to the writ the return made by the mayor, but sent the other up to the Crown-office, where it was rejected. The committee having decided, (upon the question of the right of election) that Mr. Yorke and Mr. Cust were duly elected, the indenture of return, executed by Johns and his companions, was annexed to the writ. In the case of Pontefract, Glanv. 133. the sheriff annexed two indentures to the writ, one of a return of Sir John Jackson, by the mayor, aldermen, and burgesses; another of a return of Sir Rich. Beaumont, by other aldermen, and burgesses: the election was determined to be void; but the sheriff does not appear to have incurred any reprehension from the House for his conduct<sup>o</sup>.

Decision and report.

The committee determined, 16 May, 1. that Mr. Huskisson, only, ought to have been returned;

2. That Mr. John Dayman, under-sheriff of the county of Cornwall, in annexing to the writ the indenture complained of in the said petition of William Huskisson, Esq. acted contrary to his duty, and in violation of the privileges of parliament.

Report made.

The report was made to the House 16 May; and the return was ordered to be amended by taking off the file the indenture by which Mr. Sheridan had been returned. (This was done 17 May.) It was ordered also, that the minutes of the proceedings should be laid before the House, and the special report taken into consideration, 30 May. The report was, in fact, taken into consideration, 7 June; when the entry in the Journal 1 Apr. 1803, of the proceeding in the case of Great Grimsby<sup>b</sup>, having been read, it was resolved that the charge should be heard on the Monday next, at the bar of the House, and that Mr. Dayman should then attend; that a copy of the said charge should be sent to him, and that he should be at liberty to be heard by his counsel. 11 June Mr. Dayman attended, and was heard: and having stated the reasons which induced him to annex to the writ the indenture complained of in the petition of Mr. H., he intreated the House to extend their indulgence to a fault

Proceedings in H. of C.

<sup>a</sup> See ante, Vol. i. 3, 17, 305.

<sup>b</sup> Ante, Vol. i. p. 75.

committed solely through an error in judgment. The House resolved, that in annexing that indenture to the writ, he had acted contrary to his duty, and in violation of the privileges of parliament; and ordered him into the custody of the serjeant at arms. 13 July, he petitioned for his discharge; and on the next day he was ordered to be discharged upon payment of his fees: and received the following reprimand from the Speaker:

Under-  
sheriff com-  
mitted.

' A select committee of the House, appointed to try and determine the merits of the last return for the borough of Liskeard, have reported, that you, being under-sheriff of the county of Cornwall, in annexing to the writ the indenture complained of by the petition of Mr. Huskisson, acted contrary to your duty, and in violation of the privileges of parliament: upon this charge you have been heard; and the House, after hearing you, has resolved, that you are guilty of the offence laid to your charge, and has ordered you into the custody where you now are.

Reprimand-  
ed and dis-  
charged.

' The office of sheriff is a trust of the highest importance to the parliamentary constitution of this country: the impartial execution of its duties is indispensably necessary to the preservation of the rights and privileges of this House; and all practices employed to falsify or delay the returns of members to serve in parliament, demand the severest examination.

' Your professional education and general habits of life ought to have made you acquainted with the duties of the office which you undertook, or you should have abstained from it altogether; besides which, it is but too plain, from the facts in evidence, that your attention was awakened at the time to the illegality of the act which you proceeded deliberately to commit.

' This House, nevertheless, in consideration of your alleged inexperience in such matters, and the contrition which you now feel for your offence, and hoping, that the public notice which your case has attracted may operate as a salutary warning to others upon whom the like duties may devolve, has ordered that you be now discharged; and you are discharged accordingly, paying your fees.'

## CASE LII.

### THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was appointed on the 15th of May, 1804, and consisted of the following Members :

Rt. Hon. Cha. Yorke, *Chairman*.  
Jefferys Allen, Esq.  
Michael Hicks Beach, Esq.  
Nicholas Vansittart, Esq.  
Wm. Lewis Hughes, Esq.  
Sir Ja. Graham, Bart.  
Hugh Leicester, Esq.  
John Patteson, Esq.  
Ja. Brodie, Esq.

Sir H. P. St. John Mildmay, Bart.  
William Adams, Esq.  
John Berkeley Burland, Esq.  
Arthur Howe Holdsworth, Esq.  
Geo. Johnstone, Esq. for the  
petitioners.  
Robert Ward, Esq. for Mr.  
Huskisson.

} *Nominees.*

Petitioners: 1. Thomas Sheridan, Esq. 2. Inhabitants Householders: against the election and return of Wm. Huskisson, Esq.<sup>a</sup>.

Counsel for the Petitioners: Mr. Adam. Mr. Pell.

for Mr. Huskisson: Mr. Plumer. Mr. Serjt. Lens. Mr. Hobhouse.

#### Petitions.

THE petition<sup>b</sup> of Mr. Sheridan stated, that at the last election a majority of legal voters tendered themselves in favor of the petitioner, the greater part of whom the mayor took upon himself to reject, and returned Mr. Huskisson as duly elected, by which means a double return had been made, when the petitioner alone should have been returned.

A petition of certain inhabitants<sup>c</sup> stated the election held 6 July 1802, the petitions presented against that return, and the

<sup>a</sup> Mr. Huskisson became the sitting member 17 May, when the return was amended in his favor. See *ante*, p. 332.

<sup>b</sup> Presented, 28 Mar. 1804.

<sup>c</sup> Presented, 5 Apr. A certificate was read, of the deputy clerk of the crown, signifying, that the return was delivered into the crown office, 17 Mar. The order of the House 23 Nov.

the decision of the select committee, both upon the merits, and the right of election; and the petition of appeal against the right, as reported by them: that the said petition was ordered to be considered on the 17 Apr. then ensuing: that on the 9 Mar. an election took place of one Burgess in the room of Mr. Eliot, (now Lord Eliot) at which Mr. H. and Mr. S. were candidates; and that the petitioners and others, claiming a right to vote at the election as inhabitants paying or liable to pay scot and lot, and conceiving that such right could not have been defeated by the decision of the first committee, being so petitioned against, tendered their votes to the mayor for Mr. S.; and that Mr. S. ought to have been returned by the mayor: and therefore praying, "that in case the petition of right, now pending before the House, be decided in favor of the petitioners, and those claiming to vote as inhabitants of the said borough of L. paying, or liable to pay scot and lot, the election of the said W. H. may be declared null and void; and that the said T. S. might be declared to have been duly elected; and that the return might be amended accordingly."

Both these petitions were ordered to be considered 23 Apr. The consideration of them was deferred till 15 May.

The right of election was read from the report made to the House from the committee of appeal, 11 May, 1804.

The petitioners declining to produce any evidence in support of their petitions, Mr. Huskisson's counsel applied to the committee that they might be voted frivolous and vexatious, or at least vexatious.

Mr. Adam, on behalf of the petitioners, argued, that when these petitions were presented, the question meant to be litigated was precisely the same as was before the committee in 1803<sup>a</sup>: that these petitions, so far from being frivolous or vex-

Question, whether the petition should be voted frivolous and vexatious?

Nov. 1803 was read, requiring all persons that will question any returns, to do it within 14 days next, and so within 14 days after any new return shall be brought in. "But the House not having proceeded upon business since Thursday last, (29 Mar.) and being informed, that the said pe-

tioners would have petitioned this House within 14 days next after the said return had been brought in, if they had proceeded upon business since Thursday last: ordered, that the said petition be now received."

<sup>a</sup> *Idem*, Vol. i. p. 110.

ations, occupied the attention of the committee for many days, and not even an attempt was then made to induce the committee to vote them frivolous or vexatious; that if those were not so, the present could not be: that the present petitions arose out of an accidental vacancy, which produced a new election, and a double return: that on this return there was a petition from each candidate, and the committee on Mr. Huskisson's petition had not yet made their report; that the present petitioners did not now mean to proceed, because the petition on the right of election had been decided against them, but that decision<sup>e</sup> was reported to the House only on Friday last, and until that time, his clients had the greatest confidence of success; that the witnesses which would have been necessary in this case for Mr. Huskisson, if the petitioners had persevered, must necessarily be the same as were before the committee on the right and that on Mr. Huskisson's petition, and therefore no great expence could have been incurred by Mr. Sheridan and his friends not having given notice to the other party of their having abandoned their intention of proceeding in the present cause: that such notices have been frequently given, sometimes of abundant caution, and sometimes as a cloak of compromise, but no committee had ever deemed them to be necessary. But even if the committee should consider the conduct of the petitioners to have been in any degree vexatious, the act 28 G. 3. c. 52. s. 18 & 19. would not warrant them in pronouncing the petitions themselves to be so: that the words of the statute are not the 'conduct of the parties,' but only the 'petition,' and the words of a penal law cannot be strained to a subject not obviously within them; that the committee is sworn to try the merits of the petition, and not the conduct of the parties; and that no circumstances posterior to the presenting of the petition can authorise them to report to the House that the petition is vexatious.

It was admitted<sup>n</sup> by the other side, that at the time these petitions were presented there was *probabilis causa litigandi*,

<sup>e</sup> *Ante*, p. 316.



inasmuch as the former decision on the right of election might have been reversed on the appeal then pending. But it was insisted, that as soon as that appeal was decided, the only ground on which the present petitioners could possibly stand was withdrawn from them, and it then became their duty to give notice to Mr. Huskisson that they should give no evidence before the committee; yet they had withheld any such intimation, and had in consequence put him to the expence of preparing to defend his right to the seat, and for this grievance he could have no redress, unless the committee pronounced these petitions to be vexatious; and the statute could never be intended to apply merely to the petition, but must embrace the whole conduct of the party.

The committee resolved, ' that the chairman do acquaint the counsel for the petitioners that he is at liberty to speak upon the construction of st. 28 G. 3. c. 52. s. 18 & 19. as to the power of the committee to report a petition to be frivolous and vexatious in consequence of the conduct of the petitioners subsequent to the presenting of such petition; and that there is no reason for him to reply generally. Resolutions.

After he had been heard to that point, the committee determined, 16 May, that Mr. Huskisson was duly elected; and that the petitions were not frivolous or vexatious<sup>f</sup>.

<sup>f</sup> See *ante*, Vol. i. p. 469, 473.

# CASE LIII.

## THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 19th February 1805, and consisted of the following Members :

Vise. Marham, <i>Chairman</i> .	Dav. Clephane, Esq.	
Rob. Sharpe Ainslie, Esq.	Cha. M. Ormsby, Esq.	
Sir Wm. Middleton, Bart.	Hon. Arch. Acheson.	
Vise. Fitzharris.	Anth. Hardolph Eyre, Esq.	
John Spencer Smith, Esq.	Hon. St. A. St. John, for the	} <i>Nominat.</i>
Sir Rob. Peele, Bart.	petitioner.	
Cha. Duncombe, Esq. *	Fra. Gregor, Esq. for the sitting	
Ja. Hamlyn Williams, Esq.	member.	
Cha. Mordaunt, Esq.		

Petitioners ; Electors.

Sitting Member : George Bolton Mainwaring, Esq.

Counsel for the petitioners : Mr. Plumer : Mr. Adam : Mr. Warren :  
Mr. Clifford : Mr. Jennings.

for the sitting member ; Mr. Piggott : Mr. Serjt. Lens : Mr.  
Courthope.

for the sheriff ; Mr. Milles.

**T**HIS election of one knight of the shire to represent the county of Middlesex, was held, in consequence of the former election having been declared void. See *ante*, p. 32.

*Petition.*

A petition of the several persons whose names were thereunto subscribed <sup>b</sup>, set forth that the petitioners were freeholders of the county of Middlesex, and claimed to have a right to vote at the last election for that county ; that at such election Sir F. Burdett, Baronet, and George Bolton Mainwaring, Esq. were candidates to represent the said county in parliament : that upon a shew of hands, the *sheriff*, James Shaw, Esq., and Sir William Leighton, Knt.

See *ante*,  
p. 2.

\* Excused, 25 Feb. on account of  
the death of a near relation.

<sup>b</sup> Presented, 25 Jan. 1805.

declared

declared the majority, on the view, to be in favor of Sir F. Biddett; but a poll being duly demanded for the said election, the same was granted by the said sheriff and commenced 23 July, 1804 : that the said poll continued open on the first day till about 5 o'clock in the evening ; that on every other day during the continuance of the same, the poll was kept open 7 hours ; that on divers days during such continuance, several persons attended at the booths appointed according to law, to give their votes, and did accordingly declare their votes to be in favor of Sir F. B. whose names, places of abode, and freeholds, and in whose occupation their freeholds were, were duly entered on the poll, but the sheriff refused to permit the scratches or marks to be set opposite to their names, denoting the candidates for whom they voted, until their titles to vote had been examined into, although they offered to substantiate their titles by their oaths ; nor would the sheriff allow such examination to take place at the booth, but insisted on their attending in a box, placed at a different part of the hustings, to undergo such examination ; and although such persons, in compliance with such requisition did accordingly attend at the said box, yet the consideration of many votes so circumstanced, was adjourned, for want of time, till the days respectively succeeding, and thereby great delay and confusion arose ; that in order to prevent the same in future, application was made at sundry times, by the agents, friends, and counsel of Sir F. B. to the sheriff of the said county, to keep the poll open longer than 7 hours, as by law he was bound to do, when upon good and sufficient cause requested so to do : that the said sheriff, at the several times aforesaid, refused to accede to such application : that on the 14th and 15th days of the poll, the said sheriff, together with the gentleman who then and there sat as assessor or assistant to the said sheriff, severally, and at sundry times, declared, that if at three o'clock on the said 15th day, the votes of any persons that had been before that time objected to, should not have been examined, the said sheriff would proceed upon such examination, and determine on the same, after three o'clock on the same, or the following day : and the petitioners

further stated, that at three o'clock on the 15th day of the poll, several voters were in attendance at the sheriff's box, in obedience to orders given by the sheriff, waiting to be examined in respect to the titles to their votes, which had been previously entered on the poll, and their votes declared, some for the said G. B. M. but more for the said Sir F. B. and the petitioners humbly submitted, that if the poll had been cast up at such hour, without further examination of such voters, the names of such voters ought to have been reckoned, and thereby a majority of votes received on the poll, declared, as in fact it was, in favor of Sir F. B. but the petitioners further stated, that the poll was not cast up, nor the numbers declared, till the following day, and in the mean time the sheriff, in compliance with his aforesaid promise, proceeded to satisfy himself respecting the titles of the voters so previously entered on the poll, and after such examination, directed marks to be set opposite to their names, some in favor of the said Sir F. B. and some for the said G. B. M. according to the votes previously given for one or the other of the said candidates: that a majority of the voters received on the poll did thereby also appear in favor of Sir F. B. and that the said Sir F. B. ought to have been returned to serve in this present Parliament for the county aforesaid; and that the said sheriff, well knowing the premises, did on the 16th day of the said election, illegally, wrongfully, wilfully and falsely declare the majority to be in favor of the said G. B. M., and illegally, wilfully, wrongfully, and falsely returned the said G. B. M. to serve for the said county in the present Parliament, although the said Sir F. B. had a majority in numbers of votes received on the poll in his favor, and ought to have been returned in the stead and place of the said G. B. M. to serve, &c. and therefore praying the House to order the said false return of the said sheriff to be amended, by directing the name of the said G. B. M. to be erased therefrom, and the name of the said Sir F. B. to be inserted therein, instead of the name of the said G. B. M. &c.

False return.

The

28 Jan. 1805, a petition of some freeholders was presented, praying that the election and return of Mr. Mainwaring, might be declared void, upon the

the

The following statement comprises as many of the facts of this case, as will enable the reader to apprehend the points of law arising therefrom. The election was held on the 23d of July 1804, and lasted during the whole of the time allowed by st. 25 G. 3. c. 84. namely, 15 days. The poll was taken at several booths, according to the directions of st. 18 G. 2. c. 18. s. 7. The mode of proceeding with respect to voters objected to, was as follows: the poll-clerk having entered the name of the voter, his residence, the situation and the nature of his freehold, in the corresponding columns of the poll-book, if the voter was objected to, and the inspectors on each side could not agree upon his right to vote, he was sent to the sheriff's booth, where his case was examined and decided upon by their assessor. If his vote was determined to be good, he was brought back to the poll-clerk; the freeholder's oath, and the oath against bribery were administered to him, and the usual mark was made under the name of the candidate for whom he voted. On the 1st August the following printed form was made use of: it was properly filled up, and sent round with each voter from the polling-place, to the sheriff's booth.

Facts of the case.

Objected voter.

Aug. 1804.

No. Middlesex Election.

A. B. residing at C. D. tenders his vote for E. F. in right of a freehold consisting of G. H., situate at I. K. in the occupation of L. M. objected to by N. O., nature of objection, P. Q.

R. S. Sheriff's Clerk.

This form was made use of every day during the subsequent continuance of the poll, except the last. It appeared that for the ten first days most of the objections made each day had been decided upon during the course of the day, but on the eleventh, the objections increased so much as to

the ground of Mr. M. not having a sufficient qualification to be elected to represent the county. The consideration of this petition was deferred, till 3 May. 30 Apr. the petition being

again read, and also the resolutions of the select committee appointed to try this question of the return, the order for taking the petition into consideration was discharged.

leave

leave an arrear of many votes undecided at the close of that day's poll; these were called over in order on the next morning, and decided, if the voter attended. If they were decided to be good votes, the mark was in some instances made upon the poll-book of the day before, opposite to the entry of the name of the voter, made when he first tendered his vote: in others a new entry was made in the poll of that day, upon which the decision took place.

On the 13th day, Mr. Mainwaring's counsel requested of the assessor that recourse might be had to the land-tax assessments, to see if the voters who were coming to vote were duly assessed. This request was refused, and the reason assigned for the refusal was, that they had not been produced or inspected during the former part of the election, and that the introduction of such an examination at the present time, would create great delay. On the 14th and 15th days, the numbers of persons who tendered themselves to vote for Sir F. Burdett greatly increased, and objections were made to many of them by the agents of Mr. Mainwaring: great complaints were made to the sheriffs of the frivolity and number of these objections: the sheriffs, who were also proved to have given directions to the poll-clerks to be particularly active and attentive to their duty on the last days of the poll, went personally to the different booths, and decided as many as they felt themselves competent to determine upon without the assistance of their legal adviser. The more difficult cases were sent round to the assessor. About 11 o'clock on the 15th day the accumulation of votes objected to and reserved multiplying exceedingly, a strong representation was made to the sheriffs on the part of Sir F. B. of the impossibility of deciding upon them all before three o'clock: to this representation Mr. Sheriff Shaw constantly made answer that those which remained undecided at that hour, should be discussed and determined upon afterwards. Mr. Sheriff Shaw had before declared to the sheriff's assistant, Mr. Cator, that in his private opinion the poll must finally close at three, without any regard to the tendered votes. It was therefore insisted, that what was called his promise, was merely the promulga-  
gation

gation of the opinion of his counsel, by which he had resolved to be governed; and it was remarked, that the counsel for Sir F. B. afterwards, when arguing before the assessor, upon the competency of the sheriffs to add these votes, did not in any manner allude to, or insist upon, Mr. Shaw's promise. Several of the inspectors for Sir F. B. deposed, that in consequence of this assurance they were more indifferent to the number of objections made by their opponents. One witness swore that he had represented the same difficulty to Mr. Shaw on the 14th day, and had received the same answer; that at 8 o'clock the next morning he mentioned it again, and proposed to argue the question, whether or not it was competent to the sheriff to discuss the reserved votes after 3 o'clock on the 15th day; but that the assessor told him that the question had been considered, and that the sheriffs had decided that they had the power to discuss and decide upon them after that hour; and that the counsel for Mr. Mainwaring was present when this passed, and made no objection. But the assessor, in his evidence, gave a very different account of this part of the transaction: he said, that the witness above-mentioned, on the morning of the 15th day, declared his intention of arguing the point; that he began his argument; that the assessor told him he was inclined to agree with him<sup>d</sup>, and wished to know if it was opposed on the other side; and that the counsel for Mr. Mainwaring said, with great earnestness, that it was opposed; that the assessor deferred the discussion till 3 o'clock. He said, no application had been made to him on this subject on the 14th day, nor did any communication take place respecting it between him and the sheriff till after 4 o'clock on that day.

<sup>d</sup> The following memorandum was made at the time, by the sheriff's assistants. "At the opening of the court Mr. C. requested to know the course the sheriffs intended to pursue with regard to the votes objected to, which should not be determined by the assessor previously to three o'clock, and was proceeding to argue upon the construc-

tion of the statute, when the assessor interrupted him by saying, the subject had been considered, and that the sheriffs would not sit up the post till all the votes objected to on either side, and which had been tendered previously to 3 o'clock, had been heard and determined."

The poll continued open every day from 9 to 4. If any voter was in the act of giving his vote at the time the order was given for closing the poll, that vote was taken. The books were then carried round to the sheriff's booth, and the numbers were cast up. After the close of the poll on the 14th day, the sheriffs and their assessor, with the undersheriffs and their assistant, went to Hounslow, where they dined, and consulted together upon the proper mode of closing the poll on the next day. The assessor there intimated his opinion, that votes examined after 3 o'clock might be added to the poll. On the 15th, 63 objected votes (the last of them that of J. Chalifont) were decided upon before 3 o'clock. At 3, the question, whether any more objected votes could be discussed after that hour, was argued before the assessor, and he determined to examine them. He desired that the reserved voters should be called for; and that those of them who appeared (in number 32,) should write down their names. He then proceeded to examine their cases in order. The examination lasted till 7 o'clock. If they were determined to be good, one of the poll-clerks, William Bury, referred to the original entry of the voter's name in the poll-books made when he first tendered his vote, and having administered the oaths to him in the presence of the undersheriff and the assessor, entered the word *jurat*, together with his own initials, W. B. before the voter's name, and then, asking him for whom he voted, made a mark under the name of the candidate. Of the number examined, 14 votes were decided to be good: of them 10 were given for Sir F. B. and 4 for Mr. M. It had been agreed between the candidates previously to the commencement of the election, that the oath commonly called the freeholder's oath, and the oath against bribery, should be the only oaths administered to the voters. It was understood to be required on each side, that these oaths should be generally administered during the whole election. But the assessor also stated, that during the examination, his opinion respecting the competency of the sheriff to add any of these votes to the poll had been changed; that he communicated this alteration to Mr. Shaw at Hounslow, where they had retired after the business of the



the day; advised him to review the decision of the former day, and to grant a scrutiny, if it should be required. It appeared, that the officer of the sheriffs who cast up the poll at the close of the 15th day, had made the numbers polled on that day (including the votes examined after 3,) for Sir F. B. 197; for Mr. M. 112: that upon a second casting up at Hounslow, on the evening of that day, the numbers appeared for Mr. M. 110; which gave Sir F. B. a majority of one upon the whole poll. On the morning of the 16th Mr. Piggott, Mr. Serjt. Sellon, Mr. Taddy, and Mr. Courthope, presented themselves as counsel for Mr. Mainwaring, and offered a written claim on the part of Mr. M. and of certain electors, to have the return made as the numbers stood at three o'clock on the preceding day, and a protest against any alterations made or to be made in the poll, after that hour. This matter was argued by Mr. Piggott and Mr. Taddy; Mr. Plumer and Mr. Clifford argued on the part of Sir F. B. and chiefly insisted that the question had been disposed of the day before. It was admitted however, that the sheriffs might alter their opinion, and reverse their decision, if they thought proper. The assessor then told the sheriffs that he thought they had no legal power to go on with the poll after three o'clock, and advised them to declare the numbers as they stood at that hour; which they did. They were,

For Mr. Mainwaring, . . . 2828

For Sir Francis Burdett, . . . 2823

The sheriffs also, by the advice of their assessor, refused to examine any more of the reserved votes: he was of opinion, that those who had not answered to their names when called for on the preceding evening, were barred. They likewise refused to accede to a demand made by Sir F. B. after the numbers had been declared, that the poll should be cast up in the presence of an agent of each party.

In the poll-book for the Elthorn hundred, at the end of the 15th day's poll, was the following entry;

“ The

" The following electors having tendered themselves to vote before the hour of three, and their names, residences, freehold, and description, entered in the poll books, and having been severally objected to by the agents or inspectors of Sir F. B. and G. B. M. Esq. and brought round from the place of polling to the sheriffs, for the purpose of having their right of voting decided, and that decision having been prevented by the great number of tendered votes standing for discussion, were, after the hour of three, severally called and appeared, and being heard, were adjudged good votes, and entered in the poll-book accordingly. Dated the 8th day of August 1804."

Then follow 14 names\*.

" The numbers upon the whole poll at 3 o'clock were,

For Sir F. B. . . . . 2823

For G. B. M. Esq. . . . . 2828."

" Examined, J. S."

The entry respecting the votes examined after three, was made at Hounslow on the 16th day, previously to the sheriffs coming to Brentford. The state of the numbers at the hour of three, was entered on the poll book, by the assessor's desire, on the afternoon of the 16th day, at the house of Sir Wm. Leighton, in Finsbury Square, after the return had been made and executed.

" It was admitted by the counsel for the sitting member that the number of votes apparently scratched on the poll-book are for Sir F. B. 2833, for Mr. Mainwaring 2832; and by the counsel for the petitioners, that the numbers on the poll would be (excluding the fourteen votes mentioned in the memorandum at the ending of the poll), for Sir F. B. 2823, for Mr. Mainwaring 2828."

It was proved, that the sheriffs throughout the whole election, upon all occasions, referred themselves entirely to the opinion of their assessor, except in the case of one

\* The poll, corrected by the addition of these numbers, would stand thus;

For Sir F. B. . . 2833.

For Mr. M. . . 2832.

particular voter, whom they considered themselves, contrary to his opinion, bound in conscience to reject.

The vote of a person of the name of Chalifont, had been determined good before 3; he was sworn, and the mark made, against the name of the candidate for whom he voted after 3. Another voter (Mr. Birchall) was in the act of describing the place of his residence at 3: his vote, consequently, was given after 3. These two votes were counted by the sheriffs in the number of those who voted before 3.

The counsel for the sheriffs, in their defence, declined arguing the point of law upon the return; but contended, that nothing had appeared which implicated his clients criminally, or sustained the charges of wilful misconduct that had been made against them; that they had manifested throughout the whole election the greatest anxiety that justice should be done to both parties; and that in deciding the question of law as to the close of the poll and upon their own power to decide upon votes after the hour of three on the last day, they had implicitly followed the opinion of their legal adviser; and that this circumstance was of itself sufficient to remove from them every imputation of a sinister motive, whether the opinion itself should in point of law be judged a right opinion, or not. The reader will probably conclude from the nature of the evidence before stated, that these observations were well founded; and he will see from the report of the committee, that it was not thought necessary to pass any censure upon their conduct.

Defence of  
the sheriffs.

The following is the substance of the arguments by which the counsel for the sitting member attempted to justify his return.

It is admitted on all hands, that the only question before the committee upon the present trial, is, which of the two candidates is entitled to the return? It is clear that a due election has been had; neither will there be any doubt in whose favor is the majority, when it shall have been determined at what particular time the numbers shall be taken. The facts are rendered plain by the entries actually made upon the poll: the question to be decided, is a question of

Argument  
for the sit-  
ting mem-  
ber.

Question to  
be deter-  
mined.

Entry on  
the poll.

law, arising out of those facts. It will be insisted on, as a part of the argument of the petitioner, that the very circumstance of the entry of the names on the poll, of the 14 persons received after 3 o'clock, is conclusive upon this question; and it is admitted, that had those names been duly and legally entered on the poll, they must be considered here as forming part thereof, and that no inquiry can be now made with respect to their titles to vote, or to the circumstances under which they voted. But it will be shewn, that in point of law, these names constitute no part of the poll; that the poll terminated at three o'clock; and that every thing inserted in it after that hour, was inserted by no authority, and is a nullity, as much as if it were written therein at the present moment, by an entire stranger. The question therefore is, what is the poll? It is the formal entry of what took place while the electors were giving their voices; i. e. while the poll was actually taken. It is not material to the present question, minutely to discuss the nature, or the origin of polling. The time, when the conduct of polls began to be much attended to, is shewn by the time when statutes for their regulation began to multiply; when so many rules were devised for the conduct of returning officers; and so many provisions were made for securing to the electors the enjoyment of their just rights, and for preventing frauds. Such are check-books; inspectors; the oaths administered to the returning officer, to the poll clerk, and to the elector; the formality of taking down the name and place of abode of the voter; and the safe custody of the poll-books after the election is finished. It was also considered to be of the utmost importance that a precise limit should be fixed to the duration of the poll.

What is the  
poll?

St. 25 G. 3.  
c. 84.

The st. 25 G. 3. c. 84. s. 1. has expressly directed, that no poll shall continue more than 15 days at most<sup>f</sup>; and that

<sup>f</sup> St. 25 G. 3. c. 84. s. 1. That from and after the first day of August 1785, every poll which shall be demanded at any election for a member or members to serve in Parliament, for any county, city, borough, or other

place, within England, Wales, or for the town of Berwick upon Tweed, shall commence on the day upon which the same shall be demanded, or upon the next day at farthest, (unless it shall happen to be a Sunday, and then on the

day

that if such poll shall continue until the fifteenth day, then the same shall be finally closed at or before the hour of 3 in the afternoon of the same day. This is a remedial law. It was intended, by confining the duration of the poll to 15 days, to prevent the recurrence of the mischief and inconvenience which took place at the election for Westminster in 1784; and by directing that the poll on the last day should be discontinued on or before the hour of three, it was intended to prevent the confusion that might arise from suffering a long and keenly contested election to be concluded and declared at a late hour in the day.

The framers of this statute had in view the attainment of a public object, by a general law, systematic in its nature, and universal in its operation: against the application of such a law, it is absurd to suggest the hardship which may accrue to an individual freeholder, who tenders himself at a particular time, when from the necessity of the case, and

day after,) and shall be duly and regularly proceeded in from day to day, (Sunday excepted,) until the same shall be finished; but so as that no poll for the election of any member or members to serve in Parliament, shall continue more than fifteen days at most, (Sunday excepted,) and if such poll shall continue until the fifteenth day, then the same shall be finally closed at or before the hour of three in the afternoon of the same day: and the returning officer or officers at every such election shall, immediately, or on the day next after the final close of the poll, truly, fairly, and publicly declare the name or names of the person or persons who have the majority of votes on such poll, and shall forthwith make a return of such person or persons, unless the returning officer or officers, upon a scrutiny being demanded by any candidate, or any two or more electors, shall deem it necessary to grant the

same; in which case, it shall and may be lawful for him so to do, and to proceed thereupon; but so as that in all cases of a general election, every returning officer or officers, having the return of a writ, shall cause a return of a member or members to be filed in the crown office, on or before the day on which such writ is returnable, and every other returning officer or officers, acting under a precept or mandate, shall make a return of a member or members, in obedience to such precept or mandate, at least six days before the day of the return of the writ by virtue of which such election has been made, and so that in case of any election, upon a writ issued during a session or prorogation of Parliament, and a scrutiny being granted as aforesaid, then that a return of a member or members shall be made within thirty days after the close of the poll, (or sooner, if the same can conveniently be done.)

## ELECTION CASES.

from the very provisions of the statute itself, it has become impossible to determine upon the validity of his vote, and, of course, impossible to receive it. Least of all, can such a hardship be insisted upon in this case <sup>f</sup>, of a small county, where every freeholder had ample time to come in and give his vote, but where, as it appears, many of them wilfully delayed till almost the last hour. It is singular to observe, what misapprehension has prevailed in the construction of a statute apparently of so clear a meaning. It has been erroneously supposed, that it is in the power of either candidate, under the terms of the statute, to protract the duration

<sup>f</sup> The following list of the progressive state of the poll, will shew with tolerable correctness the numbers who polled each day. In some trifling particulars it does not agree with the poll, as some persons were added on subsequent days, whose votes were not counted in the numbers as they stood on the particular day on which they voted.

		B.	M.	Total.
23 July 1804.	1st day	611	528	1139
	2d	361	399	760
	3d	265	311	576
	4th	187	257	444
	5th	192	193	385
	6th	102	152	254
	7th	204	146	350
	8th	108	108	216
	9th	93	109	202
	10th	99	106	205
	11th	55	98	153
	12th	72	70	142
	13th	150	109	259
	14th	137	136	273
	15th	187	106	293
<hr/>				
		2823	2828	5651
Received after 3 on the 15th day,		10	4	14
<hr/>				
		2833	2832	5665

On the last day, 203 tendered their votes for Sir F. B., whose votes were not received before three o'clock. It appeared from the evidence, that the voters for Sir F. B. presented themselves, usually, in great numbers at the poll, at about two o'clock. The poll closed each day, except the first and last, at four.

of the poll, in every case, for 15 days, provided he can produce voters to poll at certain intervals; whereas it is the plain duty of the returning officer to finish the poll with as much dispatch as is consistent with the rights of all parties, and with an allowance of a reasonable time to all the electors to come in, and vote. It has been also supposed, that under the 3d section, the poll may not be kept open for more than 7 hours each day: whereas the statute only prescribes that number of hours as the least period of its duration for every day, except the first. Hitherto, however, no doubt has yet been entertained upon the meaning of the words upon which the present question turns: they are express, and negative: they contain a direct prohibition to continue the poll beyond the limited hour on the last day. No legal mode of construction can alter the sense of these words. The sheriff is required immediately on the close of the poll, or on the next day, to declare the majority on *such* poll, &c. Although it is in his option as to the time of making the declaration, yet the thing to be declared, is the same; and cannot be altered by the time of declaring it. Now it is evident, that if he had declared the majority immediately, he must have made his computation of the number of votes actually received before three; how therefore can it be competent to him to declare a majority resulting from a different computation?

It is plain, and it will be admitted on the other side, that the returning officer is disabled, by this statute, from polling any person after three, on the fifteenth day. But it will be said, that the fourteen persons in question polled before three. It is submitted, on the other hand, that nothing passed before three, which can be called polling, in any sense of the word. They had (at most) tendered themselves to vote; they had observed some forms, preparatory, and introductory to giving their votes; but the material and substantial part of polling remained; namely, taking the oaths required of them, and declaring the candidate for whom

The 14 had  
not polled  
before 3.

\* See *ante*, vol. 1. p. 35. 43. 437. and see 2, *Inf.* 28.

The tender  
of a vote ;  
not polling.

they voted. It must be shewn on the other side, that the tendering was polling : but can it be pretended, that if, having tendered his vote for Sir F. B., any one of them had declared before the sheriff that he voted for Mr. M., the sheriff was not bound to add the vote to Mr. M.'s poll ? If so, the tendering was not polling. The clause of the stat. 25 G. 3. c. 84. s. 5. (which prescribes the general electors' oath) accurately distinguishes between the tender by the voter, and his admission to poll. It is enacted, that every person *claiming* to vote, shall, (if required) *before* he is admitted to poll, take the oath, &c. The claim, is the tender of the vote ; then follows the oath, if required ; and last of all, the polling, which is the allowance, and exercise of the right which had before been claimed. Either the voter had polled at three, or he had not : if he had not polled, it is clear he could not poll after three ; if he had polled, his vote could not be rejected after three, but should have been counted upon the poll, whether he had afterwards attended for the purpose of examination, or not : but it is plain, from the conduct of all parties, that something remained to be done, both by the voter, and by the sheriff : the voters tendered themselves to be examined ; the sheriff decided upon their titles ; and administered the oaths to them. The petitioners' counsel required, even on the 16th day, that the remaining voters, who had tendered, should be also examined : and, what is most important, the question, for whom they voted, was not put to them till after the hour of three. Then, it is impossible to contend that what passed in the sheriff's booth after three o'clock, can be called polling, in a legal sense : for certainly, at that hour, the poll had ceased. To say, that a private poll could be carried on in the sheriff's box in such circumstances, would not only be openly to violate the statute, but to render nugatory all the other provisions made for the conduct of county elections. The functions of the inspectors, the check-clerks, and the poll-clerks had ceased. It would moreover be highly dangerous in many cases, if the returning officer should be permitted, by reserving a number of votes to be decided

They could  
not poll after  
3.

upon



upon after the final close of the poll, to reserve to himself the power of giving the return to either candidate. Further, it appears from the circumstance of the oaths not having been administered to the voters till after three o'clock, that they had not voted till after that hour. By st. 2 G. 2. c. 24. s. 1. every person lawfully required, must take the bribery oath *before* he is admitted to poll; and by s. 2. a penalty of 100*l.* is imposed not only upon the returning officer who receives any one to vote before he has taken the oath, (when required), but also upon the elector who shall presume to vote. By st. 7 & 8 W. 3. c. 25. s. 3. the poll-clerk was directed to be sworn (among other things) to poll no freeholder who is not sworn, if so required, &c. and it was enacted, that every freeholder *before* he should be admitted to poll, should, if required, take the oath therein mentioned: by st. 10 Ann. c. 23. s. 4. it was enacted, that every freeholder (if required) "*before* he is admitted to poll at the same election, shall *first* take the oath following," &c. And by 18 G. 2. c. 18. instead of the oath prescribed by the statute of Anne, every freeholder is enjoined, *before* he is admitted to poll, *first* to take the oath therein mentioned. In this case therefore, it being admitted that it was required on each side to put the oaths indiscriminately to all the electors, it follows, that these 14 neither did, nor could poll before they had taken them<sup>a</sup>. It is submitted also, that no power or authority remained in the sheriff, or the poll-clerk, to put the oaths after the hour of 3: for the poll having then, in the words of the statute, finally closed, and the authority given, being only to administer the oath previously to the polling, the consequence is, that the oath could not be administered after three. The oath of the voter taken in such circumstances, could not support an indictment for perjury. But can it be said, that the polling shall be closed at a certain hour, and yet, that something may be done after that hour, which must *precede* polling?

Oaths administered after 3.

<sup>a</sup> It was proved, that by consent of one of them, who voted for Mr. M. both parties, the putting the oaths to was waived.

Authorities.

No decision of any former committee is applicable to the present subject. Cases may be found in the Journals of votes discussed and added to the poll after the public taking of the poll had ceased; but as these cases occurred before the st. 25 G. 3. c. 84. they can afford no authority upon the question now before the committee. In general indeed, it is easy to find an authority in the Journals for almost any proposition respecting the law of elections; and it is from a view of the variety and contradiction of the decisions to be found there, that the advantage of the present mode of trial appears in its true light. With respect to the present question, particularly, the st. 25 G. 3. seems, as it were, intended to prevent the distraction and confusion which might arise from a series of precedents, by which any course of proceeding whatever, might either be justified or condemned. The case of Bedfordshire, 1784<sup>1</sup>, is wholly different from this. First, the return was amended by a correction and an alteration of what appeared on the face of the poll: whereas here, it is contended by the petitioner, that the return should be amended by what actually appears upon the face of the poll, without any enquiry into the regularity of the mode or time of making the entries. The question there turned upon the mistake of the poll-clerk. The agreement made was, that no *tenders* should be received after a certain hour; and that the poll should be closed, as soon as the votes of those who so had tendered had been examined, and decided upon. No precise hour was fixed at which the poll should close; nor was there at that time any precise limit for the duration of it, imposed by law. It appears therefore, to have been understood by all parties, that the poll was finally closed, when all the electors who had tendered their votes had been examined, sworn, and polled; not when they had tendered only; and therefore the authority of that case, if it can be at all brought to bear on the present question, is favorable to the sitting member. In the case of Caermarthenshire, 1803, the sheriff had refused to discuss any tendered vote after the hour of three; and the election and return were sustained<sup>2</sup>.

Bedford-  
shire, 1784.

<sup>1</sup> 1 *Led.* 323.

<sup>2</sup> *Ante*, Vol. I. 282, 289.

It cannot be said, that by any application of the doctrine of relation to this case, what was done after three o'clock, can be considered as done before that hour<sup>1</sup>. This would be entirely to repeal the statute; and to leave it in the power of the returning officer, by admitting any number of tenders on the poll, to protract the election to an indefinite time. The question might be different, if it had appeared that the voter, before the hour, had done every thing required on his part to be done, and if nothing had remained but for the sheriff to exercise his judgment upon the vote. It might then perhaps have been said, that the voter having in fact polled within the legal period of time, the judgment of the sheriff, though pronounced afterwards, might be referred to the act, upon which that judgment was given; but the facts of the present case raise no such argument.

Neither is it at all material to the present question, whether the sheriff held out by his promise any expectation to the parties that the remaining votes should be discussed and decided upon after three o'clock, nor whether any freeholder was injured or delayed by such a promise having been made, and not fulfilled. This is matter for a petition on the merits of the election, for the purpose either of avoiding it, or of seating the petitioning candidate by the legal majority of votes, in contradiction to what appears on the face of the poll. Such a fraud of the returning officer constitutes a defect in the election, not in the return; and the application should have been made to a committee who had the power to revise that error. It is not, however, pretended

Relation.

Sheriff's  
promise.Merits of  
the election.

<sup>1</sup> "Relation, is, where in consideration of law, two times or other things are considered so as if they were all one; and by this the thing subsequent is said to take effect by relation at the time preceding:" *Termes de la Ley*: Tit. Relation. But it is said, 3 Co. Rep. 29. that "relations in many cases shall help acts in law, but shall never help acts of the parties; that is

to say, to make void acts of the parties good, by relation, or fiction of law." The reader who wishes to inform himself more thoroughly of the nature of this doctrine, may consult the passages referred to in the index to Lord Coke's Reports, tit. Relation; and the numerous authorities collected in Jacob's Law Dictionary, under this title.

here, that any freeholder was misled by that supposed promise; on the contrary, both the sheriffs appear, on the last day, to have taken unusual and extraordinary pains to prevent the accumulation of objected votes. But if the sheriff had inadvertently made a promise, the performance of which involved a breach of the law, and of his own duty, and had afterwards preferred his promise both to the law and to his duty; it would have been incumbent upon the House of Commons to have corrected his ill-advised pertinacity, and to have made the poll conformable, not to his promise, but to what the law required of him.

Interval between the close of the poll, and declaration of the numbers.

It may be said, that the length of the interval of time given to the sheriff by the statute between the final close of the poll, and the declaration of the numbers, indicates, that it was given to him for the purpose of deciding upon votes which might be reserved, and that so many hours could not have been allowed for the mere purpose of casting up the numbers. But it will appear, upon a more attentive consideration, that this inference cannot be supported. For the legislature could not mean that only a certain number of reserved votes should be decided upon; nor, that of a number of reserved votes, some should be decided upon, and others left undetermined. Had therefore, their design been, that any disputed votes should be determined upon after three o'clock, and that a sufficient time should be allowed for that purpose, they would have extended the time of declaring the numbers to a much longer period; since it well might happen that a much greater accumulation of reserved cases might take place. But when it is considered that the period of 15 days was assigned, not as the period to which by an abuse and misconstruction of the statute, any election *might* be protracted, but by which the election of the most populous county *must* be determined; and that the law no where prescribes, or even contemplates, the practice of casting up the numbers at the close of each day's poll; the space of one day for summing up the whole of the poll, for correcting any mistakes which may have crept into it, and for accurately ascertaining the number of  
votes

votes polled for each candidate, cannot be deemed a long or extravagant delay, or a space of time unsuitable to such an object.

A member of the committee suggested as a topic for argument the st. 30 Car. 2. st. 2. c. 1. s. 4. which requires certain oaths and a declaration, to be "solemnly and publicly made and subscribed betwixt the hours of nine in the morning and four in the afternoon," &c. by every "member of the House of Commons, at the table in the middle of the said House, and whilst a full House of Commons is there duly sitting with the Speaker in his chair:" and he adverted to the present practice of the House, of suffering members to take the oaths, and to make the declaration after the hour of four. The counsel for the sitting member observed upon this, that there was an essential distinction between the objects of the two statutes: the essential object of the st. of G. 3. was the time; but the essential object of the st. Car. 2. was, the oaths to be taken; that it was meant that they should be taken, not at any particular hour, but at the time when there was the fullest attendance of the House: the seeming violation of the statute, therefore, in this particular, was in fact, the best and most substantial obedience to it.

The counsel for the petitioners argued against the return, as follows:

The House of Commons having separated the trial of the merits of the election from the question upon the return<sup>a</sup>, it is incumbent upon this committee to keep their attention exclusively fixed upon the matter submitted to their judgment. The petitioners contend, that it was the duty of the returning officer, in the circumstances which existed at the time when he declared the numbers, to have declared them in favor of Sir Francis Burdett. There will be an opportunity hereafter to correct the poll, and to enquire who had the real majority; since it will be competent to Mr. M., should this question be decided against him, to present a petition in the usual form, and to shew his title to the seat by shewing that he has the legal majority of votes<sup>b</sup>.

Argument  
for the peti-  
tioners.

<sup>a</sup> See ante, p. 340. note c.

<sup>b</sup> See post, case LV.

Distinction  
between the  
merits of  
the election,  
and the re-  
turn.

Bedford-  
shire, 1784.

. The distinction between the question of the return and the merits of the election, is commonly met with among the proceedings of the House of Commons: It is to be found in st. 10 G. 3. c. 16. Petitions complaining of returns only, are put into a separate class; and it has been a frequent practice, where both the merits of the election and the return are made the matter of the same petition, or of different petitions presented at the same time, for the House to direct the committee of elections first to examine the question of the return, and to make a separate report thereupon to the House<sup>o</sup>. The case of Bedfordshire, 1784<sup>p</sup>, deserves a particular notice; there were three candidates; Lord Ossory was chosen by a considerable majority; Mr. St. John was returned as having a majority of one over Lord Ongley. Lord O. petitioned for the return to be amended in his favor, by the correction of a mistake made in the poll. It was alleged, that a vote had been entered for Mr. St. John which had in fact been given for Lord O. and that the sheriff (due application having been made to him for that purpose) should have corrected that mistake, and should have declared the majority in favor of Lord O. It was much discussed in the House, whether this petition related to the return only, or to the merits of the election; but it was finally determined to relate to the return only. The committee, forming their opinion upon the balance of the evidence on each side, resolved, 1. "that the application to the sheriff was such, and made in such time, as to call upon him to attend to it;" and 2. "that he ought to have taken the vote of William Lugden from the poll of Mr. St. John, and added it to the poll of Lord Ongley." They then did what the sheriff might, and ought to have done; they corrected the poll, and gave the return to Lord Ongley. Afterwards, the merits of the election became the subject of enquiry before another committee, (1785) who determined Mr. St. John to be entitled to the seat, by the legal majority of votes<sup>q</sup>. This case, therefore, affords a clear illustration of the distinction between the merits of the

<sup>o</sup> See the cases collected in note (A)  
<sup>p</sup> 1 Lud. 327.

<sup>q</sup> 2 Lud. 381. 396.

election and of the return : it affords also a material authority with respect to the present question. The case states, that the poll was closed by agreement at six o'clock on Saturday, 17 April, with an adjournment of the county court to Monday the 19th, in order to consider the rights of the votes tendered before six and not then accepted for want of time ; to discuss the votes queried during the poll ; and to cast up the numbers. This conduct was, in the ultimate event of the trial, ratified and approved by the committee ; and hence it appears, that it is neither an illegal nor an improper act in the sheriff, to employ the interval between the close of the poll and the declaration of the numbers, in examining and deciding upon reserved votes, although this intermediate act cannot properly be called either a poll, or a scrutiny. It is submitted, that it is immaterial whether the poll be closed by the operation of the statute, or by the act of the sheriff and the consent of the candidates<sup>7</sup>.

Although it be true, however, that the question upon the return is entirely distinct from any question that might arise respecting the validity or merits of the election, it is by no means true, that the conduct of the sheriffs may nor, or ought not to be taken into consideration, in discussing the question upon the return. For not only are the sheriffs accused of having acted criminally in making a false return, which charge would of itself give a jurisdiction to this committee to examine their conduct and motives in making it : but it will appear, upon reference to several of the cases

Sheriff's  
promise

<sup>7</sup> The following agreement was entered into by the candidates, with respect to closing the poll :

" Bedford, Saturday, 17 Apr. 1784.

By the consent of the candidates Lord Ossory, Lord Ongley, and Mr. St. John, the sheriff at the sitting of the Court this morning, made proclamation for all freeholders now here present, who have not polled at this election, to tender themselves to vote, and to enter their names by six of the clock this evening ; and that no

freeholder, who shall not have tendered himself, and entered his name with the sheriff's sworn clerks by that time can be received to vote at this election. And that the poll will be finally closed as soon as such freeholders, whose names shall have been so entered shall have been polled.

(Signed,)

Upper Ossory.  
Ongley.  
St. A. St. John."

already

already cited, that the House of Commons, when called upon to correct a return, have investigated the proceedings of the returning officer, not only incidentally, with a view to censure or punishment, but as being immediately connected with the subject of their principal inquiry, and as involving a very material part of the merits of the return. And cases have occurred, wherein the sheriff, or returning officer has been made immediately responsible for his conduct respecting the return, although the merits of the election were expressly excepted from the examination of the committee.

Division of  
the argu-  
ment.

The argument for the petitioners will be divided into three parts: 1. with respect to what appears on the face of the poll itself, without any reference to the circumstances of the case, or to any other extrinsic matter: 2. with respect to the evidence; of the rules prescribed by the sheriffs themselves for the regulation of their own conduct; of the expectations held out by them to the parties; and of the proceedings of the parties themselves in consequence of their assurances: 3. with respect to the st. 25 G. 3. c. 84. s. 1. the words of which are so strongly relied upon by the sitting member.

Sheriff's  
bound to de-  
clare the ac-  
tual num-  
bers.

1. It is submitted, in the first place, that the sheriff was bound to declare the numbers as they actually stood upon the poll; and that the committee will give the return to him in whose favor the majority, upon the face of the poll, appears. In declaring the numbers, the sheriff is purely ministerial: having exercised his judgment in admitting or rejecting the respective voters who have presented themselves to him, he is not at liberty afterwards to rescind his own adjudications. Such corrections are to be made hereafter, by a committee of the House of Commons, appointed to revise his proceedings: but as to him, his own acts, and the record of them entered upon the poll, is conclusive, and binds him. In the cases of Cumberland, 1768, and of Colchester, 1741<sup>1</sup>, this principle was contended for, and adopted by the House.

<sup>1</sup> See *post*, note (A.)



The fact, of the votes having been received, decides the present question in favor of Sir Francis Burdett. The reason, why they should not have been received, (whatever it may be) raises a different question, and forms the subject of a different proceeding. In this point of view therefore, considering the case singly with respect to the poll, without reference to any other point, or even admitting every other point to be adverse to the petitioner, Sir F. B. is entitled to have the return amended in his favor.

2. Secondly, to consider the subject with respect to the particular circumstances of the case, it is submitted that the sheriffs were bound by their own acts, by the plans which they themselves had adopted, resolved upon, and communicated to the parties, to declare the return in favor of Sir Francis Burdett. It will be hereafter shewn that they were not prevented from pursuing the course which they had adopted, by any directions contained in the statute. It is material, in this view of the case, to consider the particular facts which have been proved before the committee. It appears, that towards the close of the election, the attention of the sheriffs, and their assistants, was drawn to an event which might very probably happen, namely, that such an arrear might probably exist, at the final close of the poll: and that a meeting was held at Hounslow after the poll of the 14th day, for the express purpose of considering it: that it was there settled, according to the opinion of the assessor, that such voters who had been prevented from having their votes completely taken on the poll, whether by the interposition of the other side, or by the press of business preventing the assessor from deciding upon the objections, should have an opportunity after three o'clock of having their claims discussed and allowed, provided they had previously done all which was required to be done on their parts. It appeared but just, and in favor of the elective franchise, that he who came at ten o'clock, and declared for whom he voted, should not lose his vote because he who was to decide upon his vote delayed his decision upon it till four in the afternoon. It further appears, that on the morning of the fifteenth day, a distinct application was  
openly

Conduct of  
the sheriffs.

openly made to the assessor, who then stated himself to be of the same opinion. Without entering into the difference of recollection that has subsisted among the witnesses, as to the acquiescence in, or opposition made by the counsel for the sitting member to that opinion, it is sufficient to say, that admitting their dissent to have been signified, it does not appear to have had any effect upon the minds of the sheriffs, one of whom continued during the whole of the day, to promulgate in the most public manner, their resolution to examine the deferred votes, after 3 o'clock. The effect of this assurance has been proved to be, that the inspectors for Sir Francis Burdett relaxed in their exertions to have the votes for him received at the hustings, and that they beheld the attempts made by the opposite party to secure their majority by general and indiscriminate objections, with more indifference. But should the same party now prevail, in proving that this assurance was fallacious, illegal, and void, the same thing which was then considered as the best expedient to prevent their undue machinations, will in effect have been more favorable to their object than if no such expedient had been adopted to defeat them. In fact, however, this principle governed the proceedings of the whole of the fifteenth day; the voters having declared the candidate for whom they voted, their names, and their titles, contentedly withdrew themselves, relying on the opinion of the sheriffs, and their promise to do them justice, and hereafter to complete the only formality which was left unperformed, namely, the inserting the mark in the poll, under the name of the candidate for whom the vote was given. It may be said, that this delay was a matter of consent; but it must be remembered, that consent was only given upon the faith of the sheriff's promise, and upon the expectation that every vote should be decided upon, although after 3 o'clock. At 3 o'clock on the 15th day, the assessor, again, declared his opinion that the reserved votes might and ought to be examined. Conformably to this decision they were in fact examined and decided upon in the afternoon of the 15th day, and upon the adjournment to Hounslow the same evening, the poll, including those votes, was summed up, and

and the result appeared to be a majority of one in favor of Sir F. B. The assessor during all this time did not intimate the change of his opinion.

These circumstances have been insisted upon, not only with a view to such censure, or animadversion, as they may be thought to deserve; but also, to incline the committee to hold the sheriffs bound by that line of conduct which they at first declared themselves resolved to adopt, upon which they actually continued to proceed till the very close of the election, and which they then suddenly changed, to the manifest advantage of one party, and the no less apparent injury of the other, who had acted upon the faith of their assurances. It is submitted, that the rules of proceeding laid down by the sheriffs for the conduct of the election, the agreement of the parties, the departure from such rules and such agreements, and the motives and reasons thereof, are proper subjects to be taken into the consideration of the committee, although the question arise solely on the return; since the return itself is immediately affected by these circumstances.

3. Thirdly, the subject is to be considered with reference to the statute 25 G. 3. c. 84. s. 1. the provisions of which the sitting member insists to be imperative, and to render every proceeding after the hour of three on the fifteenth day of the poll, entirely null and void; and he argues, that in this view of the case, the conduct of the sheriff is foreign from the question, which must be decided on the express words of the statute. If his construction of it be true, it will follow, that if a voter come even on the tenth or twelfth day of the poll, and from a multitude of objected votes that stand for the sheriff's opinion, or from the peculiar difficulty of their cases, his title cannot be determined till after three on the 15th day, although he may have delivered his name, his freehold, and named the candidate for whom he votes; although he may even have been examined, and sworn prior to three o'clock, yet the vote will be lost, provided the sheriff does not give his adjudication on the validity of it before three; for it is said, the polling

St. 25 G. 3.  
c. 84.

must be complete before three, and, that polling, in part, consists of the receiving or allowing the vote by the sheriff; and that every thing short of that is no more than tendering.

Law before  
2. 25 G. 3.

It has been said, and it is admitted, that the st. 25 G. 3, altered the time, but left the law, in other respects, as it stood before. Then let it be asked, how did the law stand before? Before, the time was unlimited by law, as to three things: 1. the time in which the voter might come up, and declare for whom he voted: 2. the time in which the sheriff was to make up his opinion as to the number of voters; to declare who had the majority; and to make the return. As to this, it appears that he frequently adjourned the poll for several days, that he might have time for deciding upon disputed claims; and it was then competent to him to do so, provided only, that he made his return within the time named in the writ. The practice of entering votes on the poll, with a particular mark denoting that their titles were to be examined and decided upon hereafter, seems first to have been introduced at the close of the 17th century, and to have frequently met with the sanction and approbation of the House of Commons\*. 3. The time for which a scrutiny might continue. For each of these a time is fixed by st. 25 G. 3.; for the electors to come and declare their voices, before 3 o'clock on the 15th day; for the sheriff to make up his final judgment with respect to the majority, before the end of the 16th day. It being considered, that at the end of 15 days, several doubtful cases might remain to be decided upon, the space of a day and a half is given to the returning officer, uninterrupted by the coming up of fresh voters, to decide upon the titles of such electors as might so remain. Much critical observation has been applied to the words *such poll*: there is no doubt that the majority must be de-

\* Abingdon, 1688, 10 Journ. 123. 1768, 32, 27. Bedford, 1784, 1. Colchester, 1690, 10, 466. Wareham, Lud. 352. And see Caermarthenshire, 1690, 10, 520. Tregony, 1695, 11, ante, vol. i. p. 289. See vide Shewham, 493. Devises, 1690, 10, 521. Worcester, 1693, 11, 83. Cumberland, 1770, 13 Journ. 69. 2 Heyw. 334  
—342.

clared upon the numbers appearing upon *such poll*, as has been taken during the course of the 15 preceding days; the examination by the returning officer is to be confined to such persons only whose names are entered upon such poll; and who have caused their names to be inserted therein before 3 o'clock. Before the end of the sixteenth day, he is to declare who has the legal majority: that declaration is in fact, a sentence, and judgment upon the validity of all such votes as are necessary to give the majority to that candidate to whom in his opinion it actually belongs; and whether those votes have been received absolutely in the first instance, or conditionally, and subject to the judgment of the sheriff hereafter, (the judgment being given before that majority is declared,) can make no difference. The sheriff's opinion upon the vote may be deferred, but the vote itself is not delayed; and it is not necessary that the opinion should be given till the end of the 16th day: for it is then, and not till then, that he is bound to declare who has the *legal* majority.

It is said, that it is plain the oath could not be given after three o'clock; and, that as the oath must be given previous to the voter's polling, the polling could not legally take place after three; and that this argument is decisive of the question. It will appear however, that this reasoning is not so conclusive as it is imagined. The oath is to be administered only at the demand of the candidate, or of an elector: it forms no part of the polling, nor is it essential to the validity of the vote: it is optional in the party to require it to be taken, and may be waived, either absolutely, or conditionally. In this case, it was waived conditionally. The voter not being sworn before three o'clock was the consequence of the objection made by the other party, who insisted that his vote should not be allowed in the first instance, but that he should be sent round to the sheriff's box. The voter himself was willing to be sworn at the time when he gave in his description, but the party against whom the vote was to be given, instead of demanding that the oath should be administered to him, insisted that it should be postponed. Is it competent for the same party, now, to object

that the oath was not given in due time? If he has waived requiring the oath to be administered, till a time when the sheriff has no authority to administer it, and the oath itself is of no effect, it is he, (and not the voter who was ready to take it at the proper time) who must suffer for his own neglect. It therefore becomes immaterial to inquire whether an indictment for perjury could be preferred in the case of a voter who has been sworn after 3 o'clock: of whatever obligation in point of law the oath may be, it is still such as the voter was required by the candidate to take; he was not bound by law to take any other. Possibly, it might be considered, that this was, substantially, taking the oath at the time the vote was given, and so might become good, by relation to that time, *viz.* before 3 o'clock. But it is to be remembered, that the freeholder's oath was not imposed by the statute now under consideration; but by much earlier statutes; namely, by stat. 7 & 8 W. 3. c. 25. s. 3. 10 Ann. c. 23. s. 4. 18 G. 2. c. 18. In all these, the elector is directed to take an oath, *previous to polling, if required*: it must therefore be shewn, that the requisition was made that he should be sworn previous to his polling: if it has been required that he should be sworn at any other time, it is no cause of complaint to him who made the requisition, that it has been complied with. It is to be observed, that since the making of these statutes, it has been a very general practice for returning officers, in the interval between the close of the poll and the declaration of the numbers, to exercise their judgment and receive evidence respecting votes, the validity of which during the poll they had not time to determine upon. In the case of Cumberland, 1768, that the sheriff had not done so, was made the subject of the complaint of the petitioners, and of the censure and punishment of the returning officer; the House resolved, "that he had rejected votes received by him on the poll in favor of Henry Fletcher, Esq. in order to create a majority in favor of Sir James Lowther, Baronet, without hearing counsel or admitting evidence in favor of the said votes at the time of rejecting them, notwithstanding his promise to hear such counsel and receive evidence in their support." In the cases of Wareham

1690, and Tregony 1695<sup>v</sup>, the practice of examining the queried votes after the final close of the poll received the sanction of the House; yet neither in these cases, nor in any other where the same practice appears to have prevailed, was any difficulty suggested as to the administering the oaths to the voters so examined subsequent to the final close of the poll; although, by the argument on the other side, it should appear that all these, if they were sworn, must probably have been sworn after the poll was finished. Neither does it make any difference, whether it were closed by the agreement of parties, by the authority of the returning officer, or by the positive words of the act of parliament; so long as the poll was in fact finally closed, and the voter sworn (as he must have been if he were sworn at all) after the final close. The fallacy of this argument arises from considering the enactment of the statute to be positive and not qualified; as if it were in all cases required by the law, and not (as in truth it is) made in all cases to depend upon the option and act of the opposite party.

Analogy to  
cases before  
the 25 G. 3.

It has been said, that whatever these 14 voters did before 3 o'clock, can at most amount only to a tender of their votes, that they were not bound by those tenders, and that any of them, after they had been sworn, might have insisted that his vote should be taken down for the other candidate. But it is submitted, that even supposing it to have amounted to a tender only, it could not have been altered. The difference between a vote and a tender is, that a tender may be followed by the vote being rejected: if it be rejected, it cannot be counted in that election except on a scrutiny, or petition to the House. But if, either on a scrutiny, or petition, it is found that the vote ought to have been received, it is not in the voter's power then to say, I tendered for A., but I now vote for B. He is as much bound by his tender, as by his vote; and his vote when allowed by the committee, is placed to the side of him for whom it was tendered. It is therefore submitted, in this case, that the elector was irrevocably fixed, when he had declared for whom he

Voter bound  
by his tender.

<sup>v</sup> See 1 Heyw. 334. 10 Journ. 406. 11. 493.

voted. Polling is a complex act, consisting, partly of what is done by the elector, partly, by the returning officer. The elector, must declare his name, his title, and the person for whom he votes; when he has done that, the polling, *quoad* the elector, is at an end. The returning officer must allow his vote, and reckon it on one side or the other: in this part of the proceeding, the voter, as an actor, has no concern. When it may suit the returning officer to exercise his judgment upon the validity of his title, is not a matter within his power, or under his control. If he has performed what is required of him by the law, before three o'clock, he is a good vote before that hour, although the returning officer do not allow, or reckon up his vote, till after that time.

Poll, what  
is.

A poll is the taking the votes of the electors, individually, *per capita*. 1 Whitel. 393. Prynne Br. P. Red. 137. Glanv. 81. This might have been done formerly by the actual observation and memory of the returning officer: it is now required by statute to be done in writing. The material act of polling is the act of the voter: it is the duty of the returning officer to enter the proper *memorandum* of that act having been performed. In this case it appears that the voters had done all that was necessary on their part; they had declared their names, their titles, and the candidate for whom they voted. It is plain therefore, that if the poll had been by parol only, and not in writing, it would have been competent to the sheriff to count them among the number of those who actually voted. The necessity of a written poll arose from the change of circumstances. When the county court was frequented by the freeholders; when conveyances were public acts; and especially, when seats in the House of Commons were less eagerly sought, the sheriff met with no difficulty in ascertaining the persons who were chosen by the real majority. The time when undue practices first began to be resorted to, is easily seen from the laws that were made to prevent them. The stat. 7 H. 4. c. 15. required the election to be made in the full county court, after previous notice, in order to guard against undue elections, which were "sometimes made of affection



affection of sheriffs:" the st. 23 H. 6. c. 14. prescribed still more particular regulations for the conduct of elections, because, "that divers sheriffs of the counties of the realm of England had not made due elections of the knights, nor in convenient time, nor good men and true returned:" at last, the st. 7 & 8 W. 3. c. 25. still referring to the "evil practices and irregular proceedings of sheriffs," &c. marked out their duties with still greater accuracy and minuteness, and required the poll to be taken in writing. This regulation however, did not alter the substance of the thing done: the elector polled when he declared to whom he gave his vote; not when it pleased the sheriff to make a memorandum of that declaration. The st. 10 Ann. c. 23. s. 5. requires that the place of the voter's abode shall be entered, as he shall declare the same *at the time of* the giving his vote; and here, the voter's place of abode was entered long before three. The judgment of the sheriff, therefore, must be applied, by relation, to the time when the act required of the voter was done. The law of elections affords another remarkable instance of the application of the same doctrine. By st. 7 H. 4. c. 15. the election is to be made in the full county court, by all them that be there present; and by the writ it is required to be made "by those who at such proclamation shall be present;" yet, by the principle of relation, all those who come in before the close of the poll, are entitled to vote, as much as if they had actually been present at the beginning of the election, conformably to the strict words of the writ, and of the statute. At common law, if a party die after a special verdict is given, during the time the court has taken to consider of their judgment, the judgment is entered up *nunc pro tunc*, as of the term when the *postea* was returnable \*.

Relation to  
the act of  
polling.

It is therefore submitted that this return should be amended, 1. because it is contrary to the apparent majority on the face of the poll: 2. because it is inconsistent with the rules laid down by the sheriffs themselves in the conduct of the poll: 3. because it is contrary to the true meaning and spirit of the statute.

\* See Tidd's Practice, K. B. 846, 847. and the authorities there cited.

Decision and  
report.

The committee determined, 5 Mar. that Mr. Mainwaring was not duly returned; and that Sir Francis Burdett ought to have been returned to serve in parliament for the county of Middlesex.

Return  
amended and  
leave given  
to Mr. M.  
to petition.

The report was made to the House the same day; and it was ordered, that the return should be amended, by rasing out the name of Mr. M. and inserting that of Sir F. B. instead thereof. Leave was given (6 Mar.) to Mr. M. and the freeholders of the county, to question the election of Sir F. B. within 14 days, if they should think fit\*.

Adjourn-  
ment of the  
committee.

Tuesday, 19 Feb. The chairman moved for leave to adjourn from this day till Thursday next; the morrow being the day appointed for a general fast. Leave given.

\* See *post*, case L.V.

#### NOTE (A), from p. 358, 360.

The following note contains a short statement of the several cases referred to by the learned counsel in this trial; together with several others, in which the question has arisen, whether the merits of the election and of the return should be discussed together, or separately\*. The reader will also find some material information in some of them, respecting the practice of entering votes upon the poll with queries, and of examining them after the poll has been closed.

Norwich,  
1705.

Norwich. 2, 3, Nov. 3, 6, Dec. 1705; a double return and two petitions; the majority on the poll was admitted to be in favor of Mr. Bacon and Mr. Chalmers, but the returning officer doubted whether or not they were eligible, not being free of the city. The committee were instructed to hear the matter of the return and of the election at the same time; and Mr. B. and Mr. C. were resolved to be duly elected. 15 Jour. 11. 55.

Okehampton,  
1705.

Okehampton, 2 Nov. 20 Dec. 1705. A double return. Mr. Dibble in his petition stated himself and Mr. Northmore to have been duly elected, and returned, but that the mayor by

\* See *ante*, p. 11, 143.

a contrivance, had been surpris'd into signing another return of Sir S. L. and Mr. Northmore: Sir Simon Leach petitioned against the return of Mr. Dibble; and the returning officer complained of the artifice by which he was induced to sign Mr. Northmore's return. The committee were directed to examine both the matter of the return and of the election, at the same time. 15 Jour. 10, 72. Returning officer petitions against his own return.

Old Sarum. 2 Nov. 11 Dec. 1705. A double return on account of an equality of voices. The committee were directed to examine the return, and the election, at the same time. 15 Jour. 12, 60. Old Sarum, 1705.

Cirencester, 3 Nov. 1705. A double return for an equality of voices; the same direction was given, as in the former case. 15 Jour. 12. Cirencester, 1705.

[Calne. 9 Jan. 1701. The same proceeding, 10 Jour. 65.] Calne, 1701.

Clitheroe, 13, 14, 20, and 23 Jan. 1706. Mr. Dugdale, one of the bailiffs returned Mr. Parker; Mr. Pudsey, the other bailiff, returned Mr. Harvey; the former return had the common seal affixed thereto: the indenture by which Mr. Harvey was returned, purported to be between the sheriff on one part, and both the bailiffs, together with the other burgesses, on the other; that by which Mr. Parker was returned, was between the sheriff and one bailiff C. Dugdale, together with other burgesses: the House directed the committee to hear the merits of the return in the first place; and upon examination of the matters above-mentioned, Mr. Harvey was declared to be duly returned. 15 Jour. 232, 252. Clitheroe, 1706.

Steyning. 5, and 15 Feb. 1708. A double return. Mr. Goreing stated that he had been duly elected; that the constable upon casting up the poll three times, declared him to have the majority; that the *Duke of Richmond* demanded a scrutiny; but that the constable again declared that the petitioner was duly elected, and that he should return him: that notwithstanding this, in the evening he made a double return of the petitioner, and of Lord Bellew. Lord B. also petitioned. This matter was laid before the House: and the question concerning the return being first examined, it was resolved that Mr. Goreing was duly returned; and the consideration of the merits of the election was adjourned. 15 Jour. 93, 109. Steyning, 1708.

Steyning, 29 Feb. 1711. Mr. Wallis petitioned against the election of Lord Bellew, claiming the legal majority of votes, and accusing Lord B. of bribery. The House instructed the com- Steyning, 1711.

mittee is the first place to examine the matters of the return: the defect in which was, that the person named in the return was Lord Viscount Bellew, by mistake for Lord Bellew; and the return was amended accordingly. The merits of the election were afterwards reported; 8 May, 1712. The election was avoided. 17 Jour. 117, 215. See Elgin, &c. 7 Apr. 1715. 18 Jour. 54.

Monmouth,  
1715.

Monmouth, 11 June 1715. Mr. Windfor complained that he was declared to be duly elected by the mayor, and his return delivered to the sheriff, who signed it, and gave it to the petitioner to carry to the under-sheriff in London; but that the petitioner finds that another return made by persons who had no right to do so, of W. Bray, Esq. the sitting member, has been annexed to the writ. The petition was heard at the bar of the House; the counsel for the petitioner insisted in the first place, upon trying the question of the return; the counsel for the sitting member required that the merits of the election should be proceeded on at the same time, and the House resolved accordingly. 18 Jour. 167.

Minehead,  
1717.

Minehead, 23 May, 1717. The constables of the borough, and the unsuccessful candidates, petitioned the House, and stated that the constables were the proper returning officers; and that the petitioning candidates had been duly elected: but that the sheriff had refused to accept of the return made by the constables, and had received a return made by some few burgesses, of the sitting members: the House, after examining this matter caused the return made by the constables to be annexed to the writ, and gave the sitting members leave to petition. They also adjourned the consideration of the petition of the constables, and of Mr. Speake the lord of the manor of Alcombe, in the borough of M. who stated that the right of executing writs in the manor belonged to the tythingman. 18 Jour. 543, 555, 564.

Minehead,  
1721.

Minehead. 9. Jan. 1721. The return being made by the burgesses and not by the constables, contrary to the determination of the House, 13 June 1717, a return of another candidate made by the latter was ordered to be annexed to the writ; with leave given to the sitting member to petition; and the burgesses who made the first return were committed. 19 Jour. 705, 725. See ante, p. 329.

Inverness,  
1722.

Inverness, &c. 23 Oct. 1722. A petition against the return, stating that the sheriff had refused to receive the return from the proper officer, and had returned another candidate; the House resolved, to consider the merits of the return before those of the election;

election; and ordered the return made by the proper officer to be annexed to the writ. 20 Jour. 36, 37. Aberdeen, &c. the same proceeding; 25 Oct. 1722. 20 Jour. 46. Dyfart, 27 Oct. 1722. 20 Jour. 48. Same proceeding; and the person who had taken upon himself to make the return contrary to the stat. ordered to attend; and (p. 92.) committed to the custody of the serjeant at arms. N. B. In these cases the sitting members had leave to petition the House. And see Perth, &c. 20 Jour. 49. Kilrenny, &c. *ibid.* Dumbarton, &c. 21 Jour. 104. Kilrenny, &c. 30 Jour. 508.

Milborne Port, 1 Feb. 1727. A disputed claim by two officers to execute the writ; and a contested election; the House directed the committee to proceed upon the matter of the return before they entered upon the merits of the election. 21 Jour. 28. Milborne Port, 1727.

Flint Borough, 31 Jan. 1734. 24 Mar. 1736. Sir John Glynn stated in his petition, that he had been duly elected; that the returning officers were in the interest of Sir G. Wynne his antagonist; that they illegally questioned the voters upon their oaths; that at the close of the poll the petitioner had a majority of 12, and that the numbers, on casting up the poll, were so declared and published; yet the returning officer without setting aside any of the petitioner's votes, had returned Sir G. W. This petition was tried at the bar of the House, and the petitioner having given evidence concerning the taking and closing of the poll, insisted that the sitting member should proceed to justify the return before the merits of the election should be proceeded upon; but it was resolved in the negative. 22 Jour. 338, 823. Flint, 1734.

Lauder, 14 Dec. 1741. A double return by two indentures. Both the candidates stated themselves to be duly returned, and elected; ordered, that both the return and the merits of the election, shall be heard at the same time. 24 Jour. 20. Lauder, 1741.

Boffiney, 9, & 11 Dec. 1741. John Robins the mayor, petitioned the House, stating that the sheriff instead of delivering to him the precept, gave it to the last mayor, who returned the sitting members as duly elected; that the petitioner, who was the proper officer, returned J. Sabine and Chr. Tower, Esq. who were duly elected; but the sheriff refused to receive his return. The matter of this complaint was tried before the bar of the House, 11 Dec. and the return signed by the petitioner was ordered to be annexed to the writ; leave being given to the late sitting members, Boffiney, 1741.

bers, to petition the House within 14 days, if they thought fit, 24 Jour. 13, 16.

Denbigh-  
shire, 1741.

County of Denbigh, 14 Dec. 1741. The petition of the freeholders states, that Sir W. W. Wynn had a majority of 419 votes; that Mr. Myddleton his competitor, demanded a scrutiny, which was refused by the sheriff, who declared the numbers in Sir W's favor; but afterwards privately struck off near 600 votes from Sir W's poll, and returned Mr. M.

22 Feb. 1741. This petition was heard at the bar of the House, and the petitioners sustained their charges, by shewing that the sheriff had declared the numbers in favor of Sir W. W. Wynn; that during the poll he had admitted several of the voters for Sir W. with queries; that he refused to make his return at the close of the poll, till he had looked at his notes, and decided upon an objection of non-residence, of which he had doubts; and, upon the pretence of fatigue; that after making the return, he made a mark of D. which was said by them to be a mark of disallowance, (but by the sitting member, to signify doubtful) against many of Sir W's votes, which had not been queried at the poll. 23 Feb. the witnesses for the sheriff having been called and their counsel heard; the House resolved, that at the last election, &c. for the county of Denbigh, the majority of the votes received upon the poll was for the petitioner Sir W. W. Wynn, Bart., and was so declared by the high-sheriff at the close of the poll; and that no alteration was made in the said poll until after the high sheriff had made a return of a knight of the shire, to serve in this present Parliament for the said county:

That Mr. Myddleton was not duly returned; and that Sir W. W. Wynn ought to have been returned.

The counsel for the sitting member then informed the House, that owing to particular circumstances they had not had any instructions from their client respecting his defence as to the merits of the election; upon which the return was ordered to be amended by inserting the name of Sir W. W. W. instead of Mr. M. and leave was given to Mr. M. to petition the House within 14 days. It was also resolved that W. Myddleton, Esq. high-sheriff of the county of Denbigh, at the last election, having taken upon himself to return J. M. Esq. as knight of the shire, to serve in this present Parliament for the said county, contrary to the majority of votes received by him on the poll, without any subsequent examination into the rights of the voters, previous to such return; and having afterwards presumed to alter the said poll in

in order to give a color to such return, had acted partially, arbitrarily, illegally, in defiance of the laws, in manifest violation of the rights of the freeholders of the said county, and in breach of the privileges of this House. It was then ordered that he should be committed to Newgate; and that an address should be presented to his Majesty to remove him from being receiver general of the land revenue in North Wales: and from his being a justice of the peace for the county of Denbigh. 24 Jour. 18, 89, 92.

Colchester, 15 Dec. 1741. The petition of Mr. Gray and Mr. Savill states, that at the close of the poll, by the agreement of all parties and the public declaration of the returning officer they had the majority; that a scrutiny was demanded by Mr. Olmius and Mr. Martin, the unsuccessful candidates, and granted; but that upon some unreasonable request made by them under the countenance of the presiding officer, and protested against by the petitioners, the same was not proceeded in; and that the returning officer returned the said Mr. Olmius and Mr. Martin: "therefore as there stands upon the face of the poll a majority of votes for the petitioners, once received and never afterwards struck out, the petitioners apprehend they ought at all events to have been returned". They also stated, that they had the actual majority of legal votes. This case was reported, 26 Feb. 1741: and the substance of the report is as follows; the Petitioner's counsel having alleged that upon casting up the numbers on the poll there appeared a majority for the petitioners; which numbers were accordingly declared; and that no proceeding was had upon the scrutiny demanded on behalf of the sitting members, nor were any of the petitioners' votes disallowed; they insisted, that the return ought to be amended, conformable to such majority; and that it was impossible for them to proceed to object against a poll, which appeared to be in their favor; and which must be taken to be right till the contrary be shewn.

Upon the evidence it appeared that the numbers were for Gray 832, for Savill 807, for Olmius 806; for Martin 790: that the poll was closed, and adjourned to the White Hart Inn; that there having been some dispute about honorary freemen made in the years 1728 & 1729, whose votes at first were refused, it was insisted upon, and agreed to, that such freemen as had been so refused, should on their then appearance and tendering their votes, be added to the poll, in regard they were in the same situation with others, whose votes had been taken upon the poll; which was accordingly done. That then the numbers were cast up, and agreed upon as already stated; on which the sitting members asked

asked for a scrutiny, which was granted, but not begun, as the sitting members required that the right of those honorary freemen should be first decided upon; to which the petitioners objected. That there were a good number of queries put against the names of this class of voters upon the poll; and also against several persons who were objected to as paupers, but whom the mayor received, saying there would be time to discuss their right afterwards; but that the mayor, after the scrutiny had broken up, caused it to be declared that the sitting members were duly elected.

Then the counsel for the petitioners acquainted the committee that they should rest the matter, with regard to the return, upon the preceding evidence. The counsel for the sitting members insisted that it was not conformable to the methods of proceeding to determine the merits of the return, exclusive of the merits of the election, except in cases where some irregularity appeared upon the face of the return, or where the same was not executed by the proper returning officer; that the poll is not part of the return, and that the return cannot be justified without entering into the merits of the election; which, they observed, the petitioners' counsel had in some degree entered into; that this was not the first instance of a return made contrary to a majority upon the face of the poll, the like being the case in the election for the *county* of Flint, in the last parliament; and that, on the hearing of the merits of that election, the 24th of March, 1736, the House did not allow that the counsel for the sitting members should be directed to proceed in order to justify the return, before the merits of the election were proceeded upon. That though there may be an apparent majority upon the poll, the same may not be a legal majority; and as the returning officer is impowered by law, as well as bound by oath, judicially to determine upon the legality of votes, according to the last determination of the House of Commons, his return is presumed to be the result of that judgment: and they alleged, that, pursuant to the resolution of the House, read at the opening of the hearing of this election, the votes of several freemen made contrary to that resolution, who offered to poll, were rejected, and others, though admitted, were polled with queries. They further alleged, that the petitioners' agents had no right to insist upon the scrutiny's being put off when the sitting members' agents were ready to proceed: and that thereupon Serjeant Price, who was legally deputed to act as returning officer, did afterwards disallow the votes of the freemen made in 1728 and 1729, and declared a majority for the sitting members



members. In reply to which, the petitioners' counsel answered, that the poll is conclusive evidence, and that the same cannot be altered but by a scrutiny; which, in the present case, was not proceeded in by reason the sitting members' agents insisted upon an unreasonable preliminary; and that though they admitted a returning officer had a right to exercise his judgment in reconsidering the poll, yet it did not appear such judgment had been exercised in this instance. And it being the opinion of the committee that the counsel should be called in, and that the counsel for the sitting members should be directed to proceed to justify the return, without entering into the merits of the election; the counsel for the sitting members were so directed; and they proceeded to open the matter, which they intended to offer in justification thereof. And being directed to withdraw, the committee were informed that the sitting members did not desire to give the committee or the petitioners any further trouble as to the return, whereupon the committee came to the following resolutions: Resolved, that it is the opinion of this committee, that the majority of votes received upon the poll at the last election of burgesses to serve in this present Parliament for the borough of Colchester, in the county of Essex, was for the Petitioners, Charles Gray and Samuel Savill, Esquires, and was so declared at the casting up the numbers, at the close of the poll, by the town-clerk, by the direction of Robert Price, Esquire, serjeant at law, and deputy mayor of the said borough; and that no votes were afterwards disallowed.

The committee then declared their resolution, upon the question of the return, in favor of Mr. Gray and Mr. Savill; and the sitting members offered to decline contesting the seat upon the merits of the election, upon condition that the evidence already given should not be permitted to affect hereafter the question as to the right of voting in the borough; this proposal being accepted, the petitioners were declared duly elected, and the report being made to the House and agreed to, the return was amended accordingly. 24 Jour. 22. 98.

Bedwin, 7 Dec. 1747. A double return by the same officer: a petition against each return; each candidate claiming the right to be returned, and the majority of votes. It appeared upon the evidence (7 Dec. 1747.) that the double return was made by the consent of the candidates; and further that this measure proceeded from some confusion in taking the poll; but the precise question is not stated. It was tried at the bar of the

Bedwin,  
1747.

the House; and the question, that the return should be considered separately from the merits, was negatived. 25 Jour. 461.

Milborne  
Port, 1747.

Milborne Port. 17 Nov. 2 Dec. 1747. It was ordered that there be no proceedings upon the merits of the election, till the return had been fully considered. The question, who was the proper returning officer, having been decided; the candidate returned by the proper officer was admitted to sit. 25 Jour. 423. 458.

Northum-  
berland,  
1747.

Northumberland. 14 Mar. 1747. Mr. Allgood, the petitioner, stated that he had a clear majority on the poll; that the poll closed at four o'clock, 24 February; but that the sheriff refused to make his return, and adjourned his court till 9 the next morning; during which time he privately struck off many votes standing on the poll for the petitioner, and declared the next morning, that the petitioner had a majority of 11 on the poll, but that he had rejected 27 of them: and thereupon returned Lord Ossulstone. The petitioner prayed that as he had a majority of votes on the face of the poll, none of whom were legally struck off, the return might be amended in his favor. 14 Feb. the sitting member desired to give the House no further trouble, and the poll being put in, the return was amended, leave being given to the sitting member to petition, &c. 25 Jour. 565. 743.

Oxfordshire,  
1754.

County of Oxford. 3 Dec. 1754. A double return. Lord Parker and Sir Edw. Turner stated in their petition that they had a majority of legal votes, and ought to have been solely returned. Lord Wenman and Sir James Dashwood complained of the partiality of the sheriff, who declared the majority in favor of the petitioners, but having granted a scrutiny to the other candidates, allowed them to go through all their objections, before he would enter into those that were made by the petitioners: that on the 30th day of May, (the 23d day of the scrutiny) he put a period to the scrutiny for the purpose of returning the writ, and returned all the four candidates, notwithstanding the petitioners had then a majority upon the poll of votes not disallowed; for which reason they prayed that the return might be amended in their favor. The numbers originally on the poll were for Lord W. 2033. Sir J. D. 2014, Lord P. 1919. Sir E. T. 1890. 3 Dec. the petition was heard before the House, and the counsel for Lord W. whose name stood first in the return, were first heard: and they having produced the poll, and offered evidence as to what passed at the scrutiny, insisted that having shewn a majority on the face of the poll, in favor of Ld. W. and of Sir J.

D.

D. (whose case was the same as Ld. W's,) it was incumbent on the other side to attack that majority by objections to the votes, and that they had a right to reserve their objections to the votes of Ld. P. and Sir E. T., till the case on the other side had been gone through; but the House resolved, on a division, that the counsel for Lord W. and Sir J. D. be directed to proceed now upon the whole of the merits of the said election, on their part. 27 Jour. 17, 18. 42.

Litchfield, 1 Feb. 1762. Mr. Meynell stated that the numbers declared on the close of the poll were for Mr. Anson 334, for Mr. Levett 313, for the petitioner 315; but that the sheriff wrongfully granted a scrutiny to Mr. Levett, and struck off 7 of the petitioner's votes, and returned Mr. Levett: and he prayed that the return might be altered. The sheriff prayed to be permitted to vindicate himself against these charges; it was ordered accordingly, and the petition was tried at the bar of the House, 21 Jan. 1762. The petitioner put in the poll, and proved that all the votes had been thoroughly discussed during the poll, which lasted 9 days. The counsel for the sitting member were directed to confine themselves to the matter of the return. Upon this, the counsel for the sitting member produced such evidence of the sheriff's impartiality, that the counsel for the petitioner declined proceeding criminally against the said sheriff; and the counsel for the sheriff declined offering any evidence on his part to the House: the House, upon reading certain parts of the original poll, resolved not to proceed upon the merits of the election; and resolved also, that the petitioner ought to have been returned; and on reading the proceedings in the case of Denbighshire, 23 Feb. 1741, Malton, 14 Dec. 1708, and Stirlingshire, 11 Jan. 1708., they directed the deputy clerk of the crown to attend the next day, and to insert the name of Mr. Meynell in the return instead of Mr. Levett's. Leave was given to Mr. Levett to petition. 29 Jour. 17, 111, 114, 138.

Wells, 20 Jan. 1766. The return made by the proper officer annexed to the writ; and the sitting member, who had been unduly returned, at liberty to petition. 30 Jour. 466.

Cumberland, 15 Dec. 1768. The petitions of Mr. Fletcher, and of the electors in his interest, stated that Mr. F. at the close of the poll had a considerable majority; that the sheriff after the poll had been closed took some days to make his return, alleging that he wanted to be satisfied as to the right of some persons whom he had admitted to poll, in support of whose rights he had promised to receive evidence and hear arguments; but that he refused

refused to perform his promise, and arbitrarily rejected such a number of Mr. F.'s voters, as to leave a pretended majority against him in favor of Sir James Lowther. It was therefore prayed that the return might be amended, &c. Both petitions claimed the majority in favor of Mr. Fletcher and Mr. Curwen, one of the sitting members. A petition was also presented from some freeholders in the interest of Mr. Senhouse, stating that he ought to have been returned with Sir James Lowther, instead of Mr. Curwen. These petitions were tried at the bar of the House, and after general evidence being given of the partiality of the sheriff in favor of Sir J. L., the witnesses were further examined, in order to prove that the said sheriff admitted several votes upon the poll with queries, under a pretence that they were not freeholders, and with assurances that he would, at the close of the poll, examine whether the estates for which such votes were offered were freeholds or not; and afterwards, notwithstanding such assurances, the said sheriff refused to examine into the legality of the said votes, although several times applied to for that purpose; and nevertheless, rejected the votes so queried at the adjourned court, although evidence was then offered to establish the rights of the voters: the poll being read, the petitioners then insisted that having the majority of votes at the close of the poll, Mr. F. should be declared entitled to the return; and the counsel for Sir James Lowther being heard on the other side, offered in evidence certain resolutions published by the sheriff during the course of the poll, respecting the admission and rejection of votes; and also gave evidence to shew the grounds on which he had queried the votes, and that he gave no assurances of receiving evidence, &c. after the close of the poll, but that he declared himself ready to grant a scrutiny. The question being put that the counsel for the petitioners should proceed to the merits of the election, it passed in the negative; and it was resolved that Mr. Fletcher ought to have been returned. Leave was given to Sir J. Lowther to petition. 32 Jour. 26. 27. 55. 83. 89. 95. 103. 107. *ante*, p. 366.

Shoreham,  
1770.

Minutes of  
the committee.

Shoreham, 15 Dec. 1770. The returning officer admitted 87 persons to take the bribery oath, and poll for the petitioner, Sir T. Rumbold. He put queries against 76 of their names, and struck them off; and returned Mr. Purling, who had only 37 votes; because he asserted that these 76 belonged to a club, which had been bribed. Evidence was proposed to shew the constitution of this club, by the sitting member; and that its design was to secure a seat to the candidate for a certain sum. This was objected to, as involving the merits of the election, whereas the question

question now, was on the return; the sitting member insisted on his right to disqualify these voters in the present stage, and cited the following cases. *Lauder*, 1741. 24 Journ. 20. *Monmouth*, 1715. 18 Journ. 40. *Bedwin*, 1747. 25 Journ. 424. 458. *Flint*, 1736. 22 Journ. 724, 823. *Oxfordshire*, 1754. 27 Journ. 17. 42. In reply, the case of *Denbighshire* was cited.

The committee determined that the counsel should proceed. Afterwards, the petitioner was declared duly elected; but a special report was made against the club. See 33 Journ. 38. 70. 2 *Heyw.* 379.

*Morpeth*, 1775. Mr. Byron, and the electors in his interest, petitioned to have the return which had been made of Mr. Eyre, amended in his favor. A petition was presented by Mr. Bigge, charging Mr. Delme and Mr. Byron with corrupt and illegal practices, by which a colorable majority had been obtained in favor of Mr. Delme, over the petitioner: another petition (of electors) claimed the seat in favor of Mr. Eyre and Mr. Bigge. The House referred the two first petitions to be taken into consideration 24 Jan. the two last, 12 July. See also, *Downton*, 1780. 1 *Heyw.* 340. *ante*, vol. I. p. 340. And see *Bedfordshire*, 1784. 1 *Lud.* 323.

*Morpeth*,  
1775.  
1 *Ld. Cl.*  
145.

## CASE LIV.

THE BOROUGH OF KNARESBOROUGH, IN THE  
COUNTY OF YORK.

The Committee was appointed on the 27th February 1805, and consisted of the following Members :

Lord Wm. Russell, *Chairman*.

Lord Hen. Petty.

Rob. Adair, Esq.

Vic. Boyle.

Lord Lovaine.

Th. Tyrwhit, Esq.

Th. Foley, Esq.

Sir Wm. Mordaunt Milner, *Bart.*

Vic. Ebrington.

Lord Ossulton.

Sir Rob. Lawley, *Bart.*

Hon. Holland, Esq.

Hon. G. H. Lawrence Dundas.

Hon. Cha. Grey, for the peti-  
tioners.

Hon. Cha. Lawrence Dundas, for  
the returning officers <sup>a</sup>.

Nominators

Petitioners : Electors.

Counsel for the petitioners : Mr. Plumer ; Mr. Adams.  
for the returning officer : Mr. Topping.

*Petition.*

Election pre-  
vented by  
riots.

THE petition of certain lawful electors of the borough<sup>a</sup> stated that a writ having issued 9 July 1804, for the election of a burgess for Knaresborough, in the room of William Cavendish, Esq. due proclamation was made by James Collins and John Carr, the bailiffs, of an election to be holden 30 July ; and that the petitioners and several other voters were proceeding on the morning of the election to the tolbooth to give their votes, but that the said election could not be proceeded in by reason of a very great riot and tumult, raised by a large number of persons not electors, who assaulted several of the electors, magistrates, and con-

<sup>a</sup> See St. 25 G. 3. c. 24. s. 12, 12.  
20 G. 3. c. 16. s. 12.

<sup>b</sup> Presented, 24 Jan. 1805.

Tables, and blocked up the passages to the tolbooth; that the bailiffs had made the following return, which had been transmitted to the crown office. We, the bailiffs of the borough of K. &c. having received the precept of the sheriff for the election, &c. did, on the 25 July instant, make a proclamation, &c.: "that in pursuance of the said proclamation we attempted to proceed to such election with the assistance of Sir J. I. Bart. a magistrate for the west riding of the said county, and of 20 special constables; but were unable to get to the court-room by the violence of the mob, consisting of several hundred people, who had previously obtained possession of the stairs leading thereto, aided and instigated by the following persons, viz. (8 persons) and several others, whose names are at present unknown, who not only insulted and pelted the magistrate and one of the returning officers, but also took the staves from the constables, knocked them down as well as several of the electors, and destroyed their cloaths, and also dragged one of the special constables, servant to the said Sir J. I. a considerable distance to the river side, threatening to drown him; that after our return to the court-house, the said Sir J. I. being afterwards accompanied by J. W. Esq. and the Rev. C. K. two other magistrates for the said west riding, finding that it would only endanger the lives of themselves, the returning officers, and voters, if they attempted to proceed in the election, or to read the riot-act, but would be absolutely useless, as there were no soldiers nearer than the barracks at York, being twenty miles from this place, except the volunteers of Knaresbrough, several of whom were seen to encourage rather than suppress the mob; from the above circumstances, we hereby certify, that we are unable to execute the precept as directed; as witness our hands, this 30th day of July, 1804. James Collins, John Carr." The petitioners prayed the House to take the premises into early consideration, that the petitioners might be represented in the present parliament, and that the offenders might be punished.

Special return, that no election could be made.

St. 25 G. 3. c. 84. f. 10. The st. 25 G. 3. c. 84. f. 10. was read, and the petition was ordered to be taken into consideration 26 Feb. This was the first petition presented since the making of that statute, concerning a return, which was not a return of a member according to the requisition of the writ, but containing special matters only concerning such election<sup>c</sup>.

<sup>c</sup> See case of Westminster, 1784. 40 Jour. 13. 1 Heyw. 412. The clause of the statute under which this petition was presented, is as follows :

St. 25 G. 3. c. 84. f. 10. And whereas an act was passed in the 10th year of his present Majesty's reign, (intituled, an act to regulate the trials of controverted elections, or returns of members to serve in Parliament,) and another act was passed in the 11th year of his said Majesty's reign, for explaining and amending the said former act, and whereas no provision is made therein for the hearing and determining any petition, unless the same shall complain of an undue election, or return of members to serve in Parliament; be it therefore enacted, that from and after the first day of August, 1785, if upon any writ or writs to be issued for the election of any member or members to serve in Parliament, no return shall be made to the same on or before the day on which such writ is made returnable, or if a writ shall have been issued during any session or prorogation of Parliament, and no return shall be made to the same within fifty-two days after the day on which such writ bears date, or if the return made in either of such cases shall not be a return of a member or members, according to the requisition thereof, but contain special matters only concerning such election : it shall and may be lawful for any person or persons having had or claiming to have had, a right to vote

at such election, or claiming to have had a right to be returned as duly elected thereat, who shall think himself or themselves aggrieved, to petition the House of Commons concerning the same; and upon such petition being presented, a day and hour shall be appointed for taking the same into consideration, and notice thereof in writing shall forthwith be given by the Speaker, to the petitioners, and to the returning officer or officers by whom such return ought to have been made, or shall have been made, accompanied with an order to him or them to attend the House at the time appointed, by himself or themselves, his or their counsel or agents; and a select committee shall be appointed according to the directions of the said two recited acts for regulating the trial of controverted elections, which committee shall try and determine whether any, and which of the person or persons named in such petition ought to have been returned, or whether a new writ ought to issue, which determination shall be final to all intents and purposes; and the House being informed thereof by the chairman of the said select committee, shall order the same to be entered in their journals, and give the necessary directions for ordering a return to be made, and for altering the return if made, or for the issuing a new writ for a new election, or for carrying the said determination into execution, as the case may require.



The allegations of the petition were clearly proved. It appeared that the election had been prevented by a tumultuous mob, gathered together early in the morning, before the commencement of the election, and even before the candidates had been declared<sup>d</sup>: and that it had been led on and directed by the persons who were complained of in the petition. No blame was imputed to the returning officers; and their counsel declined to address the committee on their part.

Facts of the case.

The committee resolved, 1 Mar. that the petition was not frivolous or vexatious; and that the defence of the returning officers was not frivolous or vexatious: that a new writ ought to be issued for the election of a burgess to serve in this present parliament for the said borough: "that it is the opinion of this committee, that no election was held, nor any return made of a burgess to serve in parliament for the borough of K. in the county of York, in compliance with his majesty's writ, bearing date 9th July last past, directed to the sheriff of York for that purpose:

Decision and report.

"That it appears to this committee, that John Carr and James Collins, bailiffs and returning officers of the said borough, were prevented from proceeding to the election of a burgess to serve, &c. according to the precept delivered to them by virtue of the king's writ as aforesaid, by a violent tumult which took place in the said borough on the 30th of July last past, the day appointed by proclamation for holding such election. That it appears to this committee, that 7 persons, (naming them) were principally concerned in instigating or committing the outrages that took place in the said tumult, whereby the returning officers were prevented from holding an election of a member to serve in parliament for the said borough." The report was made on the same day, and a new writ ordered. It was considered by the House, 14 Mar. when, after reading from the Journal, the entries in the case of Shaftsbury, 14 Feb-

Proceedings in the House.

<sup>d</sup> See the case of Nottingham, *ante*, Vol. i. p. 38.

1776<sup>e</sup>, and Ilchester, 18 May 1803<sup>f</sup>, the House agreed with the committee in their three last resolutions, and ordered, that the Attorney General should forthwith prosecute the 7 persons named in the report, for their offences.

Proceedings  
at Law.

The information was tried at the summer assizes for Yorkshire, 1805, when three persons of the names of Allen, Abbott, and Dewes, were found guilty. On the 5th of February 1806, Allen (having been in the King's Bench prison since 9 Nov. 1805) was sentenced by the court to be imprisoned in Newgate 6 calendar months, and to give security for his good behaviour for 4 years, himself in 100*l.* and two sureties in 50*l.* each. Abbott and Dewes were sentenced to be imprisoned in the custody of the marshal of K. B. 3 calendar months, and to give security for 4 years, themselves in 100*l.* each, and their two sureties respectively in 50*l.* each. Abbott had been imprisoned since 9 Nov. 1805, and Dewes since 1 Feb. 1806.

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tice need  
not be given  
to persons  
complain-  
ed of.

Before the special resolutions relative to the misconduct of the persons complained of had been passed, it was asked by one of the committee whether notice should not have been given them of the charges made against them; but the counsel for the petitioners stated, that it was not usual in similar cases to give a notice: that no notice was given where the individuals against whom a complaint was made, were *not* named in the petition: *à fortiori* it was unnecessary, where they were named; since the charge against them became in some degree public, being entered on the Journal of the House: that it was the common practice of committees to pass special resolutions respecting the misconduct of individuals, as it was disclosed before them in evidence, although it was not made a matter of allegation in the petition, and although no notice had been given to the individuals; an instance of which was referred to in the case of

<sup>f</sup> 14 Feb. 2 Ld. Gl. 337.

<sup>f</sup> *Ante*, Vol. i. p. 306.

ichester, 1803<sup>a</sup>, where particular persons, by name, had been resolved to have been engaged in a system of corruption; and that resolution had been reported to the House. It was also stated, that no notice had been given to the sheriffs, in the case of Middlesex 1804, of the charges made against them. It was admitted, that in the present case no notice had been given to the persons accused.

<sup>a</sup> *Ante*, Vol. I. p. 306.

## CASE LV.

### THE COUNTY OF MIDDLESEX.

The Committee was appointed on the 7th of February 1806, and consisted of the following Members :

Rt. Hon. Isaac Corry, <i>Chairman</i> .	John Princep, Esq.	
P. Langmead, Esq.	Geo. Galway Mills, Esq.	
Ja. Daly, Esq.	Cha. O'Hara, Esq.	
Rt. Hon. Sir John Stewart, Bart.	Jos. Holden Strutt, Esq.	
John Palmer, Esq.	Henry Joddrell, Esq. for the peti-	} <i>Nominees.</i>
Sir Wm. Young, Bart.	tioners,	
Ja. Macdonald, Esq.	Lord Porchester, appointed by the	
Rt. Hon. Geo. Canning.	first 13 <sup>a</sup> ,	
Sir Jac. H. Arkley, Bart.		

Petitioners : George Boulton Mainwaring, Esq. and electors.

No party appeared in opposition to the petition.

Counsel for the petitioners ; Mr. Piggott ; Mr. Serjt. Lens ; in the absence of either, Mr. Courthope.

**M**R. G. B. Mainwaring, and certain electors in his interest, petitioned<sup>b</sup> against the election of Sir F. Burdett<sup>c</sup>, and stated that Mr. Mainwaring was entitled to the

<sup>a</sup> See ft. 28 G. 3. c. 52. s. 14.

Mar. 1805, renewed 22 Jan. 1806.

<sup>b</sup> The petition was presented, 23

<sup>c</sup> See *ante*, p. 370.

Sir-  
ting  
member de-  
clines to de-  
fend his seat.

Ele-  
ctors ad-  
mitted par-  
ties in his  
stead.

Evidence  
before the  
committee.

seat. The petition was ordered to be considered, 9 April. 22 Mar. the entries in the Journal in the case of Middlesex 26 April and 2 Jun. 1803 were read, and the consideration of the petition was fixed for 25 April; and it was ordered, that lists of voters objected to should be exchanged, on or before 15 April. 10 April an order was made for deferring the exchange of lists till 20 April, and the consideration of the petition till 7 May. 6 May, the Speaker informed the House that he had received a written declaration from Sir F. Burdett that he did not intend to defend his election<sup>d</sup>: the consideration of the petition was deferred till 7 June. 5 June a petition was presented from certain freeholders, stating that the first-mentioned petition had been presented to the House; that Sir F. B. had declared his intention not to defend his election or return; and praying, that under and by virtue of the provisions and enactments contained in st. 28. G. 3. c. 52. the petitioners might be admitted as parties in the room of the said Sir F. B. and be considered as such to all intents and purposes<sup>e</sup>. "Ordered, that the said petitioners be admitted parties in the room of the said Sir F. B. according to the prayer of the said petition. The consideration of the first petition was further deferred, by several orders, to 1 Aug. and on 17 June an order was made for the exchange of lists of voters objected to between the two sets of petitioners on or before 20 July. 12 July the parliament was prorogued till 22 August, and it met again 21 Jan. 1806. The petition of Mr. Mainwaring, &c. was renewed 22 Jan. The electors in the interest of Sir F. B. did not renew their petition; nor had they entered into any recognizances.

The clerk of the crown produced the last return for the county of Middlesex, as amended by the order of the House, 5 March, 1805; and the order of the House that the return should be so amended, was likewise read in evidence. The poll for the last election was then put in; and

<sup>d</sup> See st. 23 G. 3. c. 52. s. 4. Flintshire, *ante* Vol. i. p. 526. Lisleard, *ante*, p. 325.

<sup>e</sup> St. 28 G. 3. c. 52. s. 3. See *ante*, case of Ludgershall, 1791, Vol. i. p. 377.

the numbers appearing to be for Sir Francis Burdett, 2833 ; and for Mr. Mainwaring, 2832 ; the counsel for the petitioners produced evidence to disqualify two of the voters for<sup>r</sup> Sir F. B. ; upon which the committee (8 Feb.) resolved Mr. Mainwaring to be duly elected. They also resolved the petition not to be frivolous or vexatious ; and that the election was not vexatious or corrupt<sup>r</sup>. The counsel for the petitioners suggested, that the committee could not declare the defence to be frivolous or vexatious in this case, since no party appeared in opposition to the petition ; and the st. 28 G. 3. c. 52. s. 20. refers only to the opposition made to petitions by any party ' who shall have appeared before' the committee.

Petitioner  
proves his  
majority.

Election of  
sitting mem-  
ber not vex-  
atious or  
corrupt.

<sup>r</sup> See the case of *Watersford*, *ante*, Vol. i. p. 239.

<sup>r</sup> St. 28 G. 3. c. 52. s. 18. If no party shall have appeared before the committee in opposition to such petition, " they shall then report to the House, whether such election or re-

turn, or such alleged omission of a return, or such alleged insufficiency of a return, as shall be complained of in such petition, according as the case may be, did or did not appear to them to be vexatious, or corrupt." See *Finsbury*, *ante*, Vol. i. p. 528.

though there was a great majority of legal votes in favor of the petitioner over him.

Right of  
election  
agreed, 1725-

An entry in the Journal of the House on the right of election was then read, which is as follows: "16th April 1725; the right of election was agreed to be in the bailiff, capital burgeses, and inhabitants of the borough, paying scot and lot." 20 Journ. 493.

After this the standing order of the 16th of January 1735-6, was read.

Statements.

The counsel for the petitioners then delivered in the following statement of the right of election: "The right of election for the borough of Leominster in the county of Hereford is in the bailiff, capital burgeses, and inhabitants paying scot and lot."

The counsel for the sitting member then delivered in a statement to the same effect. [These statements are entered in the journal of the committee, and the lines are scored through.] The numbers on the poll as produced by the returning officer were as follows:

For Hunter	-	-	462
For Pollen	-	-	291
For Biddulph	-	-	290

Maj. for Pollen - 1

The counsel on each side proposed to disqualify several of the voters for the opposite party, upon the objections of felony; infancy; receipt of alms; want of inhabitancy; not having paid to the poor's rate; and not being possessed of rateable property. The committee do not appear, from the minutes, to have determined upon the title of any voter separately. The following are the decisions which were made during the trial.

<sup>b</sup> And see Jour. Apr. 3, 1701. Leominster sent members to Parliament, 26 Edw. 1. 4 Brynne, 1025. It is said to have been incorporated by Q. Mary. Willis, Not. Parl. 3, 25. The bailiff of the borough is the returning officer. The petitioners in the

present case, contended that the words 'paying scot and lot,' applied to the corporators, as well as to the inhabitants; but the committee do not appear to have come to any decision upon this point.

The

The counsel for the petitioners having in their opening impeached the validity of the poor's rates, the committee directed an argument upon that point on the fourth day of their sitting.

Arg. where  
the rate may  
be impeach-  
ed.

The poor's rate of the 11th of November 1795 was made for one quarter of a year ending the 29th September of the same year. The rate of the 28th January 1796 was also retrospective, being made for one quarter ending the 25th December 1795<sup>c</sup>. The signatures of the churchwardens and overseers were not annexed to the last rate, and the allowance of the justices was written on a detached blank leaf. Under these circumstances it was contended, that the rates were informal and void, and consequently that the petitioners were entitled to go into evidence of rateability: that all rates ought to have a prospective and not a retrospective effect; as by paying to a retrospective rate a person could not be said to contribute to the present burthens of the parish, which is the basis of the elective franchise in scot and lot boroughs: that if fraud could be proved in the concoction of the rate, the committee ought to receive evidence of it, though unappealed against; and that this was the practice of the superior courts in the case of a fraudulent award. They also contended, that the allowance of the justices of the rate of January 1796, being written on a detached leaf, could not be deemed a legal allowance; and that as the rate was not signed by the churchwardens and overseers of the poor, it was absolutely void.

The counsel for the sitting member contended that a retrospective rate was valid according to principle and decided cases. In the case of the King against the Inhabitants of Stapleton, rates made in 1766 to defray the expences of 1765 were held legal<sup>d</sup>; and in the case of Mitchell, 1784<sup>e</sup> the rate was retrospective, and no objection made. To the objection, that the rate of Jan. 1796 was not signed by the

<sup>c</sup> The Parliament was dissolved 20 May, 1796, and the new writs ordered to be returned 12 July.

<sup>d</sup> B. S. C. 649. See R. v. Ish. of

Micklefield Cald. 507.

<sup>e</sup> 1 Lud. 93. See Leominster, 1791. *ante*, Vol. i. p. 482.

churchwardens and overseers, it was answered, that it was only a continuance of the former rate, and that by signing one the other was also virtually signed; but admitting, that in point of law the rates were illegal, yet as they were not appealed against they must now be considered as valid; and the case of *St. Giles Cripplegate v. St. Mary Newington*, in *Vin. Abr. tit. Settlement*, K. 9. and *Durrant v. Boyes*, 6 T. R. 580. were said to be directly in point. In the King *v. the Inhabitants of Openshaw*, *Burr. Sett. Caf.* 522. the rate was signed by three inhabitants: it was neither signed by the overseers, allowed by the justices, or published in the church. Yet Lord Mansfield declared the rate was valid, sufficiently to give the persons rated and paying a settlement.

Decision.  
Rates retrospective, and informally signed; yet if not appealed against, can't be impeached before the committee.

The committee, after deliberation, informed the parties by their chairman, that it was then too late to impeach either of the rates, and that being on the rates was evidence that the voter was possessed of rateable property on the 27th of November 1795, being 6 months previous to the election <sup>f</sup>. N. B. The evidence of fraud was very slight.

No evidence admitted, of the voter not having rateable property.

On the following day, the counsel for the petitioners proposed to call a witness to prove, that a voter who voted for the sitting member, was not in the occupation of any rateable property on the 27th of November 1795, but the committee determined that the proposition was inadmissible. They then proposed to give evidence, that certain persons standing on both rates, had ceased to occupy rateable property between the 28th of Jan. and the time of the election <sup>g</sup>; but the committee determined "that the above proposition was inadmissible."

Decision and report.

On Saturday 10 Dec. The Petitioner declined any further proceedings on the merits of his petition and the sitting member was declared duly elected <sup>h</sup>.

<sup>f</sup> See the cases cited in the note, *ante*, Vol. i. p. 479.

<sup>g</sup> As the evidence offered upon this point had no tendency to contradict the

rates, it seems doubtful upon what principle this decision was founded.

<sup>h</sup> Reported, 22 Dec. See 52 *Journ.* 191.



The following incidental points occurred.

Wm. Proberts was offered to be put on the poll for the petitioner. He was rejected by the returning officer as being on the November rate only. In the January rate the same premises were rated in the name of Thomas Proberts. The counsel for the petitioner proposed to add the name to Mr. Biddulph's poll, and to call the overseer to prove, that Wm. Proberts was the person rated, and that the christian name of Thomas was inserted by mistake, and that no other person than Wm. Proberts was intended to be rated, and that both rates in fact had been collected from Wm. Proberts. The counsel for the sitting member objected to this proposition, and the committee determined "that the overseer be not called!" On the following day the counsel for the petitioner proposed to call evidence to prove that William Proberts paid the two rates of the 11th November 1795, and 28 Jan. 1796; but the committee also determined that it was inadmissible <sup>k</sup>.

Incidental points. Voter rated by a wrong christian name; bad.

Evidence of the payment of the rate, refused.

The petitioner's counsel in his summing up of the evidence, proposed to add to Mr. Biddulph's poll John Bedford, rejected by the returning officer as being a person employed during the hop season as an assistant to the Excise, but the committee determined, 'that the counsel for the petitioner having proceeded to sum up, and having closed their case, be not permitted to endeavour to establish that vote!'

Petitioner having closed his case, not allowed to give fresh evidence to establish rejected voters.

Francis Weaver was objected to by the sitting member for having received parish relief within the year; and John Gethin was called to prove a confession of Weaver made after the election, that his wife had been relieved by the parish. This was objected to as being subsequent to the election; but the committee resolved, 'that the declaration of a voter, which tends to destroy his vote, is admissible, whether made before or after the election, unless that declaration goes to affect that voter with penal consequences <sup>m</sup>.'

Declaration of the voter against his right after the election admissible.

<sup>1</sup> See *ante*, p. 66, 67.

<sup>m</sup> See *ante*, p. 141, 142, 227, 228.

<sup>k</sup> See *ante*, p. 73.

Vol. i. p. 304.

See *ante*, Vol. i. p. 63, 292, 338.

Petitioner  
having  
closed his  
case, not al-  
lowed to  
give fresh  
evidence to  
disqualify  
votes.

Thomas Bush was objected to by the sitting member for not having paid his poor rates previous to the election; and the overseer was called to prove the fact. He said, that it appeared from the rates, that he was in arrear. In his cross-examination, he was asked if it was an uncommon thing for persons to be returned in arrear; and particularly whether certain persons, naming them, had not been so returned. These persons had voted for the sitting member; but their votes had not been objected to in the opening of the petitioner's case. The counsel for the sitting member objected to any examination, after the petitioner had closed his case, for the purpose of shewing that particular voters not objected to in the opening of their case, nor made the subject of evidence in the progress of it, were not entitled to vote on the ground of non-payment of the sums for which they were rated. The committee determined, 'that the counsel for the petitioner having closed their case, shall not be permitted upon cross-examination, to go into evidence upon this head of objection.'

Tender.

It does not appear that the committee came to any determination upon the question of the tender of votes proposed to be added to the poll. See *ante*, p. 163.

## APPENDIX, No. II.

THE BOROUGH OF MALMESBURY, IN THE COUNTY  
OF WILTS; 1796, 1797.

The Committee (in 1796,) appointed on the 1st of November, consisted of  
the following Members ;

Sir Ch. W. R. Boughton, Bart.

*Chairman.*

Wm. Gore Langton, Esq.

Wm. Manning, Esq.

Wm. Morland, Esq.

Sir Jas. Stewart Denham, Bart.

Hon. Evelyn Pierrepont.

Hon. A. Foley.

Mark Pringle, Esq.

Jos. H. Strutt, Esq.

Edward Burrow, Esq.

Evan Nepean, Esq.

Wm. Wilberforce Bird, Esq.

Miles P. Andrews, Esq.

Tho. Manners Sutton,

Esq.

John Fordyce, Esq.

} Nominees.

Petitioners : 1. James John Vassar, Esq. 2. Burgesses.

Sitting Members : Samuel Smith, Esq. Peter Isaac Thellusson, Esq.

Counsel for the petitioners : Mr. Graham ; Mr. Dallas.

for the sitting members : Mr. Adam ; Mr. Lens.

THE petitions were read <sup>a</sup> containing an account, at some length, of the proceedings at the election, and a complaint of the conduct of the returning officer ; they also stated, that the right of election did not only belong to the alderman and capital burgesses of the borough, but to the burgesses at large ; the majority of whom had elected the petitioner, Mr. Vassar. Petitions.  
1796.

Immediately after the petitions had been read, the committee required of the different parties a statement of the right for which they respectively meant to contend <sup>b</sup> ; when the petitioners stated the right to be “ in the alderman, Statements  
of right.

<sup>a</sup> Presented, 17 Oct. 1796, 52 <sup>b</sup> See *ante*, p. 279 vol. i. p. 211.  
Journ. 35, 36.

capital burgesses, assistants, landholders, and commoners of the said borough." The sitting members, "in the alderman and 12 capital burgesses of the said borough only."

The evidence and arguments in this case, and in the case of the same borough in the latter part of the same session, being very nearly the same, the substance of both will be comprised in one report; but as the circumstances attending the second petition were in some respects peculiar, and as the whole of the proceedings, both before the committees and afterwards in the House, may furnish an authority in future cases, a short statement will be here given of them in their order.

Determina-  
tion of right.

The committee determined on the 7th of Nov. that the right stated by the sitting members, was the right of election in the borough of Malmesbury, and that the sitting members were duly elected; and they made their report to the House accordingly<sup>c</sup>.

New writ.

On the 9th of the same month, a new writ was ordered for a member to serve in the room of Mr. S. Smith, who had made his election for Leicester. Mr. Metcalfe was returned. Mr. Vassar again petitioned<sup>d</sup>; alleging as before, that the right of election was not in the select body of alderman and capital burgesses, but in all the burgesses. A committee was appointed on the 5th of May 1797, to try the merits of his petition, and consisted of the following members:

ad election  
ad petition.

1797.

Hon. Hen. Hobart, *Chairman*.  
Hen. Strachey, Esq.  
A. Boucherett, Esq.  
J. Blackburn, Esq. of Aldborough.  
Rob. Clive, Esq.  
James Brodie, Esq.  
Sir Wm. Lowther, Bart.  
Cha. Duncombe, Esq.

Cha. Chester, Esq.  
Wm. H. Fellowes, Esq.  
Wm. Praed, Esq.  
Geo. White Thomas, Esq.  
James Fox, Esq.  
Boyd Alexander, Esq. } *Nominees*.  
Cha. Bragge, Esq. }

Petitioner: James John Vassar, Esq.

Sitting Member: Phillip Metcalfe, Esq.

Counsel for the petitioner: Mr. Dallas; Mr. Milles.

for the sitting member: Mr. Adam; Mr. Lens.

<sup>c</sup> 52 Jour. 102.

Dec. 1796. 52 Journ. 158.

<sup>d</sup> The petition was presented, 6

The petition was first read. Then the resolution of the last committee upon the right of election, as reported to the House; and the standing order of the House, 16 Jan. 1737, were read. It was admitted on the part of the petitioner, that his case depended entirely upon his establishing the right of election mentioned in his petition. The committee required, as before, statements of the right from each party; and the same statements were given in as had been laid before the former committee. But before the counsel for the petitioner opened his case, the counsel for the sitting member submitted, that no evidence could be received to support the right of election contained in the petitioner's statement, or to impeach in any manner the right resolved upon by the former committee, and reported by them to the House of Commons.

Statements of right.

Whether a right reported, is conclusive within the first year?

They contended, that although the decision of the former committee was liable to be reversed upon a petition of appeal, presented within a year, according to the provisions of the statute 28 G. 3. c. 52. s. 25. yet it was final to all other purposes, and conclusive as to the right of election, upon any contest that might arise after the making of it, whether within the year, or after the expiration of it. By the st. 2. G. 2. c. 24. s. 4. a remedy had been provided for the uncertainty and fluctuation which had taken place in the decisions of the House. Upon the passing of the Grenville act, the boroughs which had not already been protected by a resolution of the House, remained subject to the same fluctuation; there being no similar provision, whereby the decision of a select committee was made final; but by the 28 G. 3. the decisions of a committee, reported to the House, were placed upon the same footing as those of the House had formerly been, subject only to be questioned in a particular manner, and according to certain forms prescribed by the act. They are to be impeached by no other method; and therefore in this case the petitioner, who professes to rest his case entirely upon the proof of a right of election, different from that resolved upon by the last committee, has mistaken the proper course of his proceeding, which should have been, first to set aside the former decision, (to which also he himself was a party) by a petition of

Argument as to last determination. For sitting member.

appeal; or at least, at the same time when he presented the present petition, to have also petitioned against the decision of the last committee; for otherwise it might happen that two or more committees sitting to try the same question of right, might come to different determinations, each of equal weight, entitled to the same respect, entered upon the Journals with the same forms, and even of the same authority, until the lapse of a year should make the first decision final, to the exclusion and repeal of all the rest.

Argument  
for petition-  
er.

The counsel for the petitioner admitted that the decision of the first committee, if not appealed against, would, at the end of a year from its being reported to the House, become final and conclusive, notwithstanding any decisions which might have taken place during the year; but they contended, that by the very words of the statute 28 G. 3. c. 52. s. 27. the decision of the committee is made final, only *if no petition of appeal* is presented within a year; which necessarily excludes the proposition that it is final within the year. That the petitioner had adopted the only course by which he could obtain the object he sought; namely, the seat; which was not to be affected by any petition of appeal. That the present petition and a petition of appeal, were of a nature perfectly distinct, the one being to ascertain the right as an abstract subject, the other to ascertain a fact only, viz. whether the petitioner were duly elected; in respect to which, the right might indeed come in question, but only as an incidental and collateral matter. Neither was there less difference in the forms prescribed in prosecuting the two petitions; so that, had Mr. Vassar presented a petition of appeal, as well as a petition for the seat, each petition must necessarily have been referred to a separate committee, who might still have decided differently, and the inconvenience and contradiction stated by the other side, would still have remained.

Determina-  
tion.

The committee having heard the arguments of two counsel on each side, determined that the petitioner should proceed to open his case.

The substance of the evidence on both sides is as follows:

A char-

A charter of King Athelstan is recited in that of King Charles the First, (hereafter mentioned,) in these words;

Charter of  
K. Athel-  
stan.

Ego Athelstanus Rex Anglorum, Do pro me, et meis successoribus, burgenſibus meis et eorum omnibus ſucceſſoribus Medulſſuensis burge, quod habeant et teneant ſemper omnes functiones et liberas conſuetudines ſuas, ſicut tenuerunt tempore regis Edwardi patris mei, illibate, et honorifice; et præcipio omnibus ſub imperio meo quod non faciant eis injuriam, et ſint quieti abſque Calumpniâ de Burghbote<sup>a</sup>, Brugbote<sup>b</sup>, Wardwyte<sup>c</sup>, Horngelde<sup>d</sup>, and Scot; et do et concedo eis illam Brueram Regiam quinque hidarum<sup>e</sup> terræ, juxta Villunculam meam de Nortana, propter auxilium eorum in conſictu meo contra Daneos. Conſecta eſt hujus donationis Cartula cum ſigno meo, per Teſtimonium Edmundi fratris mei, per Conſilium Magiſtri Walſiæ Can- cellarii noſtri, et Odonis Theſaurarii mei, et Godwini. Godwinus, qui fert Vexillum Regis perquiſivit hoc pro burgenſibus<sup>f</sup>.

Sic in orig.

King Henry the Fourth, by his charter 2 July 1411, 28 Nov. 5 R. 2. recites by Inſpeximus a charter of 5 R. 2<sup>o</sup>. by which the foregoing charter of Athelſtan had been confirmed, ' præfatis burgenſibus ac eorum hæredibus et ſucceſſoribus, burgenſibus Villæ prædictæ.' It proceeds: ' Nos autem litteras prædictas et omnia contenta in eiſdem rata habentes et grata, ea pro nobis et hæredibus noſtris, quantum in nobis eſt, acceptamus, approbamus, ratificamus, et præfatis burgenſibus ac eorum hæredibus et ſucceſſoribus, burgenſibus Villæ prædictæ confirmamus, prout litteræ prædictæ rationabiliter teſtantur. Prætereà, volentes eiſdem burgenſibus gratiam uberioſorem facere in hæc parte, concedimus pro nobis et hæredibus noſtris, præfatis burgenſibus, quod licet ipſi aut eorum antecēſſores ſeu predeceſſores, burgenſes

<sup>a</sup> Auxilium dicitur quod ex conſuetudine debetur, ad reſtaurationem urbium, burgorum, caſtrorum. Spelman, h. v.

<sup>b</sup> Pontis reſectio. Ibid.

<sup>c</sup> Immunitas a præſidiis faciendis: hic vero, mulcta pro warda non exhibitâ. Ibid.

<sup>d</sup> Tributum quod a cornetis animalibus exigitur. Ibid.

<sup>e</sup> A hide was ſaid to be 116 acres.

<sup>f</sup> King Athelſtan was buried at Malmesbury, A. D. 941. See Tindal's note to Rapin's Hiſt. Lambard's Dict.

<sup>g</sup> This charter of R. 2. could not be found.

villæ prædictæ, aliqua vel aliquid libertatum et Quietanciarum in dictis Chartâ et litteris contentarum, aliquo casu emergenti hætenus plenè usi seu gavisi non fuerint, idem tamen burgenſes ac eorum hæredes et ſucceſſores burgenſes ejusdem villæ libertatibus et Quietanciis illis et earum quâlibet de cetero plenè gaudeant et utantur, ſine occaſione vel impedimento noſtri vel hæredum noſtrorum, Juſticiarorum, Eſcaetorum, Vicecomitum, aut aliorum Ballivorum ſeu Miniſtrorum noſtrorum quorumcunque. Hiis Teſtibus, &c. Datum per manum noſtram apud Weſtm. ſecundo die Julij. Pro quinque marcis ſolutis in Hanaperio.

Cart. de anno Regni Regis Henrici quarti Duodecimo.

Prima pars patentium de anno regis Caroli undecimo.

SI CAR. I.

‘Rex omnibus, &c. Cum burgus de Malmesbury in comitatu noſtro Wiltes ſit antiquus burgus, ac Medulſufenſis burgus olim fuerit nuncupatus, cumque idem burgus extendit, et a tempore cujus contrarii memoria hominis non exiſtit, extendebat ſe tam in et per totam villam de Malmesbury prædictam, quam in et per totam villam de Weſtport in eodem comitatu Wiltes: cumque burgenſes burgi illius, ratione diverſarum præſcriptionum et conſuetudinum a tempore quo non extat memoria in eodem burgo uſitatarum, diverſis libertatibus, franchiſis, privilegiis, immunitatibus, et quietanciis uſi et gavisi fuerunt; cumque Dominus Athelſtanus quondam rex Anglorum chartam ſuam burgenſibus ejusdem burgi fecit in hæc verba,’ &c. — The charter of Athelſtan is here recited, and afterwards the charter of H. 4. (that of R. 2. being left unnoticed.) ‘Cumque burgus prædictus modo ſit populofus, ac præcipue de burgenſibus pannificium et mercaturam ſtrenuè exercentibus habitatus, cumque inſuper quamplures tranſgreſſus et alia maleſicia infra burgum prædictum in dies facti ſint, et pro eo quod non ſunt in burgo illo magiſtratus qui offenſas ibidem perpetratas ſuppliciiis per leges et ſtatuta regni noſtri Angliæ in reos hujusmodi conſtitutis debite et feſtinè corrigant, ſæpius ſit quod malefactores impunè abeant,’ &c. &c. nos conſiderantes, &c. volumus et declaramus, ‘quod burgus prædictus ſit et de cetero imperpetuum permaneat liber burgus.



burgus de se, per totas antiquas pristinasque limites et bundas sive terminatus, et quod homines et liberi burgenses burgi prædicti et successores sui perpetuis futuris temporibus, sint et erunt unum corpus corporatum et politicum, in re, facto, et nomine, per nomen aldermanni, et burgensium burgi de Malmesbury in comitatu Wiltes,' &c. &c.

The king after granting the usual corporate privileges, constitutes the different members of the corporation; 'quod de cætero imperpetuum sint et erunt, &c. unus qui aldermannus et duodecim alii qui capitales burgenses et viginti quatuor alii qui assistentes ejusdem burgi vocabuntur, qui quidem capitalis burgenses, et assistentes, de tempore in tempus erunt consulentes et auxiliantes aldermanno ejusdem burgi pro tempore existenti.'

Constitution  
appointed  
by the charter.

Assistants.

The alderman to be elected every year by the existing alderman and capital burgesses, from among the capital burgesses.

The office of capital burgess to be for life; and vacancies to be supplied by election of the alderman and the rest of the capital burgesses from among the assistants.

The office of assistant to be also for life; and vacancies to be supplied by election of the alderman, capital burgesses, and the rest of the assistants, 'de illis liberis burgensibus ejusdem burgi qui vocantur et a tempore cujus contrarii memoria hominis non existit vocati fuerunt, *Landholders*.'

Then a power is given to the alderman and capital burgesses to remove or otherwise punish such of the capital burgesses, assistants, or officers of the borough as shall misbehave themselves: they are also empowered to elect a steward.

Ambrose Parris, alias Looker, 'a free burgess of the said borough,' is appointed the modern alderman. 12 other free burgesses are appointed capital burgesses. 24 free burgesses are appointed assistants. Also the steward, and sergeants at mace, are appointed by name.

The alderman is made a justice of the peace within the borough; and coroner.

It is unnecessary to insert any more of the provisions of this charter, which are very long and minute: it is sufficient to observe, that the whole of the governing power is com-

mitted to the alderman and 12 capital burgesſes, over all the inhabitants, reſidents in the borough : that the name of commoners does not occur throughout the whole of the charter ; nor are any proviſions made concerning the free burgesſes, who were underſtood to be the commoners, or corporators at large. The charter concludes with a confirmation to the alderman and burgesſes of all the ancient privileges which, under whatever name of incorporation, by preſcription or otherwiſe, they have hitherto enjoyed. Both this charter, and that of W. 3. are entirely ſilent reſpecting the right of election. The date is the 24th of July, at Weſtmiſter.

W. 3.

In the reign of W. 3. a new charter was granted to the borough, all the members of it, except Lord Wharton the ſteward, having forfeited their offices by neglecting to ſubſcribe the aſſociation mentioned in the act for the better ſecuring of his majeſty's royal perſon and government. It is except in a few particulars, a mere copy of the charter of Charles : the material variations are theſe : the deputy alderman, and the ſteward are created juſtices of the peace, as well as the alderman.

After an incorporation as before of alderman, burgesſes, &c. the alderman and *capital* burgesſes are incorporated by the name of ' the alderman and capital burgesſes of the borough of Malmesbury in the county of Wilts,' with power to take lands, &c. and to have a common ſeal.

After reciting, that the alderman and capital burgesſes by reaſon of fundry preſcriptions and immemorial cuſtoms uſed and approved in the ſaid borough, have had and held to themſelves ' diſtinctè a cæteris liberis burgenſibus burgi prædicti,' a certain hoſpital called St. John's Hoſpital, and certain lands called the Alderman's Kitchen, the burgeſs parts, and the burgeſs lands for the ſupport of their offices and dignity, ' de certitudine juris et tituli ſui ad domum terras tenementa hereditamenta redditus et ſervitia prædicta aliquantulum dubitat. nos, volentes dubia hujusmodi tollere, &c. concedimus et confirmamus præfato aldermanno & capitalibus burgenſibus,' &c. naming ſeparately the whole of the lands poſſeſſed by the ſelect body.

The

The precise nature and constitution of the borough appeared from the oral evidence, and from the muniments of the corporation. And it may be here observed, that no records were said to be existing of an earlier date than 1722; a circumstance which occasioned much observation on the part of the petitioner.

The corporation was said to consist of an alderman, 12 capital burgeses, 24 assistants, 42 landholders, and an indefinite number of commoners or free burgeses. The title to be received as a commoner was, the being the son of a commoner; marrying the daughter of a commoner; birth\*; a continual residence and parochial settlement within the borough, and in all cases an actual residence at the time of the claim. He who is thus qualified offers himself at a court of the borough, and if his claim be admitted his name is entered in a book, and he is then entitled to a right of common in the heath granted by Athelstan, called King's Heath. These commoners are generally in number about 200, or something less; and succeed by seniority to the situation of landholder, whereby they become entitled to an acre of land. There are 42 landholders. The assistants have likewise an acre of land, retaining their right of common; and they are put into possession of their office by the delivery of a turf. The capital burgeses, on their election, do not retain their acre of land, but acquire other lands of about the value of 10*l.* per annum to each. The alderman has in addition to this, four acres more, known by the name of The Alderman's Kitchen. Besides these lands, there are some more, in and out of the borough, held by the corporation, the profits of which were said to be applied to the feasts of the alderman and capital burgeses.

\* *Quere.*

There are two seals used within the borough; a larger one which is affixed to returns, and other instruments of a more public and solemn nature; a smaller, with which leases of burgeses-lands, &c. are sealed.

The assistants are summoned at the courts of the borough, by the serjeants at mace. Their presence is required upon every matter of public business which occurs.

It was proved that as far back as memory or tradition could

*Usage.*

Returns.

could reach, the right of voting at elections had been exercised by the alderman and twelve capital burgesses only.

Malmesbury, as Dr. Willis writes, first sent members to Parliament 23 Edw. 1.; but the first return extant, (and which was produced in evidence) is 26 Edw. 1.<sup>m</sup>, which is contained in the general return for the county. The members for Malmesbury are stated to be returned *pro communitate burgi*. The returns of the 1 H. 5. & 5 H. 5. (the former of which is printed in Brady's Appendix, p. 31.) are in the same form. The first separate return is 33 H. 6.; it is made by the alderman and burgesses, under a common seal, and is signed by at least 14 names, besides the alderman; it is mutilated and imperfect. It was stated that there were some intervening returns between 33 H. 6. & 17 Edw. 4. in the same form of a separate indenture for the borough. But none other of the returns given in evidence were signed by more than 12 names, except those made to the Prince of Orange's letters. The second return produced was the 17 Edw. 4. which was by way of schedule for the whole county, as before<sup>n</sup>.

In the 1 & 2 P. & M. the return is made by the burgesses only; and in the 3 Car. 1. it is stated, "The alderman has set his name as a *burgess*, and with the consent of the burgesses has affixed the seal of the borough."

With these exceptions, from the first of Q. Mary to the 3d of April 1660, they are made by the alderman and burgesses, sealed with the larger corporate seal, and stated to be "for themselves and the whole body and inhabitants of the said borough."

From the 13 Car. 2. they are made by the alderman and capital burgesses, for the whole body, or community, and are signed by the public seal: there are however, from time to time, some variations, which are here set down:

3 Nov. 25 Car. 2. "Edward Brown, alderman, Henry Arnold, and eleven others being all and every the said burgesses of the said borough."

<sup>m</sup> And see 4 Prynne, 1053, who states the first return extant to be 26 Edw. 1. Brady, 110.

<sup>n</sup> See *ante*, p. 280.

The most remarkable difference appeared in the answer to the letter of the Prince of Orange directed 'To the chief magistrate, or such others of the borough of Malmesbury in the county of Wilts, who have right to make returns to serve in Parliament according to the ancient usage of the said borough before the seizure or surrender of charters made in the time of King Charles the Second'." Prince of Orange's letter, 1688.

To this letter the following answer was returned ;

" To the clerk of the crown in the Court of Chancery ; Answer of the borough of M.

I, Elias Ferris, alderman of the borough of Malmesbury in the county of Wilts, in pursuance of his Highness the Prince of Orange's letter for the choosing of two members to represent this said borough in the convention to be held at Westminster the two and twentieth day of this instant month of January, and in obedience thereunto have (after due notice given) caused an election to be held and made according to the ancient usage of the said borough, and do hereby certify and declare that the Hon. Colonel Henry Wharton and Colonel Charles Godfrey are, by the free and unanimous consent of the capital burgessees and other inhabitants of the said borough, duly and legally elected to serve for and represent the said borough in the said convention of Parliament to be held the said two and twentieth day of this instant January, there to consult and agree of and to all such matters and things as shall be there treated of for the good of the weal public. In witness whereof I have hereunto affixed the common seal of the said borough, this 15th day of January Anno Dom. 1688-9.

Elias Ferris, Alderman.

In further testimony whereof we the capital burgessees, assistants, landholders, and other the free burgessees of the borough of Malmesbury in the county of Wilts, have hereunto set our hands.

\* The letter itself may be seen in the 80th volume of the Journals, p. 7 & 8; it directs the elections to be made "by such persons only, as, according to the ancient laws and customs of right ought

to choose members for Parliament;" and requires the returns to be made before the 22d day of January. The date is at St. James's, 29 Dec. 1688.

Signed

Signed by 10 'capital burgesſes;' 15 'of the company of aſſiſtants;' 19 'landholders;' and 27 'commoners.'

In the 3 W. & M. the return is, by the alderman and burgesſes, with the whole aſſent and conſent of the capital burgesſes of the ſaid borough.

1 Ann. By the alderman and burgesſes, with the conſent of the reſt of the burgesſes.

**Journals.**

The Parliamentary hiſtory of this borough is further to be collected from ſeveral paſſages of the Journals of the Houſe of Commons;

27 May 1685. 9 Journ. 720. A petition of Henry Wharton and William Jephſon, Eſqrs. was read; its contents are not ſet forth there. The following is a copy of it;

**Petition of  
Mr. Whar-  
ton and Mr.  
Jephſon.**

The humble petition of Henry Wharton and William Jephſon, Eſqrs. Sheweth, that whereas your petitioners were, by the unanimous conſent of all the burgesſes and inhabitants of the ancient borough of Malmesbury, in the county of Wilts, elected and choſen to ſerve burgesſes for the ſaid borough in this preſent Parliament; and by an indenture ſealed with the ſeal of the corporation accordingly returned; yet notwithstanding, one Thomas Stump, who is not either burgeſs or inhabitant within the ſaid borough, did cauſe certain perſons, to the number of thirteen or thereabouts, to aſſemble in order to an election, when ſome of the ſaid perſons were, and ſtill are, inhabitants in another county, and none of the reſt were burgesſes or inhabitants within the ſaid borough; and the ſaid perſons ſo aſſembled did, without the conſent or approbation of any of the burgesſes or inhabitants aforeſaid, make an inſtrument in the nature of an indenture from the ſaid corporation for the election of Sir Thomas Eliſcourt and John Fitzherbert, Eſqrs. as burgesſes to ſerve for the ſaid borough; and the Sheriff of the ſaid borough of Wilts hath cauſed the ſame to be annexed to the precept and returned unto the crown-office, reſuſing to accept of the indenture aforeſaid, whereby your petitioners are, by the unanimous conſent of the ſaid burgesſes and inhabitants of the ſame borough, elected as aforeſaid. No proceedings upon this petition appear in the Journals.

23 Jan. 1688. 10 Jour. 13. Col. H. Wharton, who had been returned both for this borough and for the county of Westmorland, made his election to serve for the latter; whereupon, in consequence of another letter dated the 24th of January 1688-9, another return was made similar to the former in all respects; by which the Hon. Colonel Tolle-mache was elected. This return is dated the 30th of January 1688-9. The Convention Parliament was dissolved 6 Feb. 1689-90. The next parliament met 20 March 1689-90.

1 Apr. 1690. 10 Jour. 361. A petition of Craven Howard, Esq. and Sir Thomas Estcourt, Knt. was read; setting forth, that the petitioners were legally elected by eleven of the thirteen electors for the borough of Malmesbury in the county of Wilts; nevertheless one Elias Ferris and the sheriff have returned Edward Wharton, Esq. and Sir James Long, in prejudice of the petitioners.

Petition of  
Mr. How-  
ard, and  
Sir T. Est-  
court.

This parliament was prorogued on the 23d May 1690, and met again the 2d of October. No further proceedings upon this petition appear: but it should seem that the sitting members kept their seats; for on the 25th of Jan. 1691 a new writ is ordered for Malmesbury in the room of Sir James Long, Bart. deceased.

29 Mar. 1699. 12 Journ. 622. "The right of election was agreed to be in the alderman, and twelve capital burgesses."

Agreements  
of the right.

13 Dec. 1722. 20 Journ. 77. It was agreed, "to be in the alderman, and 12 capital burgesses." The committee also reported, "that it was admitted and it appeared by the charter, that this corporation consists of one alderman, twelve capital burgesses, and 24 assistants: that the alderman and the twelve capital burgesses, for the time being, or the major part of them, are the governing part of the corporation; and by them the capital burgesses are to be elect-

It is so stated in the printed Journals; but in the copy of the petition, which the reporter has seen, the sitting member is said to be the Hon. Goodwin Wharton.

ed, out of the 24 assistants." Upon the merits of the case, which have no relation to the present purpose, the petitioners were declared duly elected.

Question in  
this case.

The only question in this case was, whether or not the right of election was exclusively confined to the alderman and capital burgesses? For if it belonged to any of the other parts of the corporation, viz. to the assistants, landholders, or commoners, the petitioner had the majority of votes.

Observation  
upon the  
points in dis-  
pute.

The case was so ably investigated and discussed on both sides, during the trial of the two causes, and particularly of the last of them, that the question, at last, assumed a very simple and distinct shape. The facts from which it arose, and the general principles upon which it was to be decided, being, for the most part, agreed upon, a mere statement of that which was admitted, will suffice to introduce the reader to the points in dispute.

First, as to the facts, it was agreed, that the charter of Athelstan was a sufficient charter of incorporation of all those persons to whom the land therein mentioned was granted, even supposing them not to have been already incorporated by some grant of Edward the Elder referred to in that charter: that it sufficiently appeared by the immemorial enjoyment of that land, who the persons incorporated were, namely, the landholders, and commoners. That the borough of Malmesbury had sent members to parliament as early as any other borough: that the returns were corporate returns; and that the elective franchise in this borough was a corporate right, existing in those to whom it belonged, in their corporate character: that the earlier returns were constantly made under the name of the alderman and burgesses. That this word was of various and flexible import; and that, as in other cases, so its meaning when applied to this particular place was to be collected from the history and circumstances of the place. It was further agreed, that as in point of fact the charters of King Charles and King William were entirely silent with respect to the elective franchise, so, in point of law, their provisions could neither incidentally or otherwise, have any operation, to alter, abrogate, or restrain that right, as it antecedently existed from



from time immemorial: that if the antecedent right could be once clearly shewn, different from the right now exercised, the latter could not be protected even by the longest usage in its favor. These things being admitted, the only question left for the decision of the committee was, whether or not it had been shewn on the part of the petitioner by argument or by evidence, that the right of election did not originally belong to the select body of alderman and capital burghesses. And the petitioner contended, first, that the right was in no select body, or particular part, but in the whole corporation at large; secondly, that if the committee should be of opinion it was in a select body, that the select body must be held to consist of the alderman, capital burghesses, and assistants, and not of the alderman and capital burghesses only.

Argument for the petitioner.

First, the history of the borough does not afford a trace of the existence of any select body previous to the charter of Charles the first, much less of the existence of that particular body then constituted. The right of election is immemorial; therefore the body in which it resides must be also immemorial; for it is plain, if the right be immemorial, and the origin of the present possessors of it can be shewn; that the right must formerly have belonged to others.

Argument  
for the pe-  
titioner.  
Commence-  
ment of the  
select body.

Now it is evident that the charter of Charles the first created the capital burghesses. Whoever attends to the form and object of that charter, will observe that it is both a charter of privileges, and of government; that with respect to privileges, it is confirmatory; with respect to government, it is creative. It recites very ample and ancient privileges; but with respect to municipal authority and internal regulation, it gives us to understand that the constitution of the borough was entirely defective. All the provisions made to rectify these defects are therefore new: no recital is made of any persons who before enjoyed any pre-eminence or governing authority within the borough, but it is granted that *hereafter* there shall be 12 capital burghesses, who are named, not from any former governors, (as would naturally have been expected, had such existed) but from  
among

Charter  
Car. 1. cre-  
ated them.

among the free burgesſes. On the other hand, the corporate rights and privileges are left and confirmed to thoſe who then enjoyed them, namely, the body at large, who conſequently muſt then have been in the enjoyment of the right of election, ſince there was no ſelect deſcription of perſons exiſting by whom it could be exerciſed. In the preſent age indeed, and for ſeveral centuries back, the uniform practice has been to mark out by charter, the internal form of government within the corporation, and to eſtabliſh different orders and degrees among the members of it. But in ancient times it frequently happened that no ſuch proviſion was made, all the corporators being left upon an equal footing with each other; of which ſome inſtances ſtill remain; but in general, they have found it convenient to introduce a ſyſtem of ſubordination among themſelves by their own bye-laws, where their charters are ſilent upon the ſubject. For any thing that appears, prior to the charter of Charles, the members of the corporation of Malmesbury were all equal among themſelves. Even the diſtinction of

**Alderman.**

**Chr of W.**  
3.

It will be ſaid, that the charter of W. 3. recites the enjoyment of certain eſtates by the capital burgesſes from time immemorial; but it is an extraordinary thing, if that recital were true, that the charter of Charles ſhould not once mention the name of a capital burgeſs, or allude in the moſt diſtant manner to any ſimilar deſcription of perſons; from which, and from the events which appear to have taken place about the ſame time, and which will be preſently obſerved upon, it is much to be ſuſpected that this recital was introduced to ſerve particular purpoſes, and to ſupport an uſurpation which was then in great danger of being put an end to.

\* V. Spelman, voc. Alderman.

Secondly, it is to be considered, what light the returns to Returns. parliament before the charter afford as to the persons by whom they were made. It has been observed, that the early grants are made to the burgesses generally; the charter of Charles the First is also granted to the whole body. Now the returns both before and long after that charter are made by the alderman and burgesses, and in the name of the community, or of the whole body: to whom therefore, by any rule of construction can the word burgesses be applied, but to the same persons who under that name received the charters from Athelstan, from Richard 2., from H. 4., from Car. 1.; and who to this day, are in the enjoyment of the privileges granted and confirmed by those charters? So that even if a select body could be shewn to have existed prior to the charter of Charles, to whom by possibility the elective franchise might have belonged, still, the language of the returns expounded by the charters, and by the actual enjoyment under them, would sufficiently shew that in point of fact the select body did not elect the members, but the corporators at large. In addition to which it may be observed, that although the select body have been proved since their creation to have made use of a particular seal, in matters which concern themselves only, yet the returns have from the first, even to the present time, been signed with the public, corporate seal of the borough.

Such is the argument to be drawn from the general form of the earlier returns; there are however two or three particular returns, which furnish strong observations upon this subject.

The return of 33 H. 6. being signed by more than 12 33 H. 6. names, could not possibly have been made by the select number.

In the 1st and 2d of Philip and Mary it is made by the 1 & 2. P. & M. burgesses only; which shews that the alderman was not at that time considered as an integral part of the corporation; and that is further proved by the return of 3 Car. 1. where the alderman is expressly stated to have set his name as a burgess,

*burgess*, and by the consent of the burgesses to have affixed the seal of the borough.

Time of the  
usurpation,  
by the select  
body.

It is curious to observe, that although the select body was created 11 Car. 1. it did not, if we may judge by the language of the returns, assume the exercise of the elective franchise, till immediately after the restoration. Indeed that time was peculiarly favorable to such an usurpation. The plan of increasing the power of the crown by the possession of an absolute authority over the governing part of all corporations was already formed; and Dr. Brady was probably even then contributing to the ultimate object of that plan, by endeavouring to shew that the right of voting at elections properly belonged to the governing part, and not to the corporators at large. It is apparent however by the alteration in the form of the return, that some change must at that time have taken place; and it is also apparent, from the use of the adjective word, *capital*, upon that occasion, that the word *burgess*, simply, was never used to express one of a select body.

Prince of  
Orange's  
letter.

But the return to the Prince of Orange's letter is decisive. It is a certificate of the ancient usage, made, not by the persons only whose successors now claim the right, but by the very parties who oppose them, viz. the select body, who joined in the return. And that this was not done by neglect, or carelessness, arising from the general exultation of all ranks, and from the confusion that might have prevailed at that time, is proved by a second return exactly similar, made soon after, for the purpose of supplying a particular vacancy. This evidence derives additional strength from considering that the general body had, before that time, asserted their right in parliament, in 1685.

In April 1690 the return was again made by the general body; and although the candidates in the other interest petitioned against it, the sitting members appear to have retained their seats, for in the next year a new writ is ordered for the borough in the room of one of them who had died. In 1696 Mr. Wharton was again returned; it may be presumed he was re-elected by the same persons who had

Quare.

formerly

formerly supported him, and not by those who had petitioned against him; so that within the last hundred years there appears to have been three at least, and most probably, four instances, in which the right now contended for by the petitioners has been actually exercised; in two of which it has also been acknowledged and authenticated in the most public and solemn manner.

To the agreements in 1699 and 1722 can be allowed Agreement.  
but little weight, against this evidence. They were made by persons having an equal interest in excluding the corporators and defending the right of the select body, because each candidate thought he had a majority of the latter. As the corporators at large were no parties to either of these agreements, it is not just that their rights should be concluded, or affected by them. In the case of Pontefract, Pontefract.  
though the right of election had been decided by the House of Commons to belong to the inhabitants, it was twice agreed by contending candidates to belong to the burgrave-tenants; and the usage, as far back as could be traced, was consistent with the agreements, and repugnant to the determination of the House. This instance is only cited to shew how little reliance should be placed on agreements by candidates, who may find it mutually convenient to compromise the rights of the real electors.

Upon this part of the case therefore it is submitted, that there does not appear to have been a select body in the borough of Malmesbury before the charter of Charles the First; that if such a body did exist, they did not make the returns of members to Parliament; that on the contrary, the corporators at large made the returns uniformly, from the 26 Edw. 1. down to the restoration; and in at least three instances, even since that time; on all which grounds it follows, that the right still belongs to the corporators at large, and that the petitioners, being chosen by a majority of them, ought to sit.

But further, should the committee be of opinion that the right belongs to a select body, it is evident that the select body includes the assistants as well as the capital burgesses.

2. The assistants are part of the select body.

For both these descriptions of persons are created by the charter of Charles; they are named by him out of the free burgesses, and are appointed for the same purposes, namely to counsel and assist the alderman in all things relating to the borough. They compose a part of the governing body in the corporation. Upon whatever footing therefore the right of the capital burgesses stands, that of the assistants rests upon the same; and the petitioner being elected by a majority of them, in this view of the case also, he is entitled to the seat.

Argument  
for the sit-  
ting mem-  
ber.

The counsel for the sitting member, in their answer to these arguments, insisted that the rules to which the petitioner had resorted in order to discover the original right of election in this borough, were fallacious and uncertain; that in point of evidence attempted, on either side, to be produced from ancient times, the case rested in presumption only; but that the presumption in favor of their client, was confirmed and established by the usage of later times, on which they mainly relied, and which they contended to be in all cases the safest, but in this, the only guide.

Usage.

Early re-  
turns.

The language of the early returns throws but little light upon the subject; it is admitted that all the corporators are burgesses; but the question for the committee to decide is, whether all the burgesses exercised the right, or whether the exercise of it was committed to the particular authority of some select branch of the corporation? In either case the electors were properly described under the general appellation of burgesses.

It is asked, who made the returns in the reign of Edw. 1? the answer is not easily given; but it should be required of the petitioners, who seek to destroy a right which has been established by so long a possession. The difficulty of giving an answer to it, arises, in the first place, from the estimation in which the power of choosing members was anciently held. It was not then a franchise, but a burthen; only endured, if it could not be avoided. He, therefore, who searches for it as a matter of right and privilege in times when  
it

It did not exist as a right or privilege, must not be disappointed if his search is fruitless. Another difficulty, equally insurmountable, arises from the extreme carelessness of the sheriffs in making their returns. Previous to the 26 Edw. 1. it is said that the returns were made for the county and for all the boroughs within it, at a county court holden by the sheriff, attended by deputies from the different boroughs, wherein neither the electors nor the representatives of particular places are distinguished: from that period to the 33 H. 6. (in the case of the borough of Malmesbury) the returns are made in a schedule, naming indeed the members returned, but still silent as to the particular persons who elected them. The return of H. 6. is relied upon by the petitioners; but to draw any authority from that piece of evidence, they should have shewn, that at the period when it was made, that which was before most uncertain and irregular, had now become so accurate and determined as to afford a certain light to all succeeding times, as to the persons engaged in these proceedings: whereas on the contrary, we find in the next return, in Edw. 4. that every thing had returned to the same state of uncertainty as before; the 23 H. 6. having had no further attention paid to it than to be obeyed on one occasion only, namely, at the election which took place immediately after the making of it. But allowing all the authority to this return which is demanded, it does not prove, in any manner, the point contended for; inasmuch as it might still be made by a select number; and it will presently be shewn that it is not necessary for the sitting members to prove that the select or governing body has always passed by the same name, possessed the same powers, or consisted of the same numbers.

Select body  
incidentally  
altered.

It is said, the ancient returns are made for the community of the borough: but that phrase is generally made use of in all returns; and is merely the echo of the writ, which requires the members to be returned, for the purpose of consenting 'for the whole community.' Besides, by whomsoever a member of Parliament is elected, when

Pro community  
nitate.

elected, he represents the whole community of the place for which he is returned. This principle of virtual representation pervades our constitution, and is too familiar to require to be illustrated by any particular instances.

Returns to  
Car. I.

The returns therefore, down to the time of Charles the First, afford no means of acquiring any precise knowledge of the description of persons by whom the elections were made; their being signed in all instances except in 33 H. 6. by a number less than twelve, affords however, a strong argument that they were constantly made by the select body, viz. by the capital burghesses, or by other persons answering to the same description.

Charter  
Car. I.

But it is contended, that it appears from the very words of the charter of Charles, that the select body was then created. The same argument would apply to the alderman; an officer that beyond all doubt existed long before; yet it is said of him too, that hereafter there shall be an alderman; and the modern alderman is named from among the free burghesses. The circumstance of there having been an alderman before the charter, implies a form of government subsisting at that time; that it was weak and defective is testified by the charter itself; but it is certain, that the distinction of landholders and commoners was known in the borough from time immemorial, and probably some further distinction of orders and degrees then subsisted; for it is not easy to suppose that they were destitute of such officers and governors, and of such a system of municipal œconomy as is generally seen to exist in all corporations by prescription; affording a model upon which subsequent charters have in most instances framed the constitution of the borough. And admitting that the form of government were incidentally altered by the charter of King Charles, and that a select body were thereby created, differing in some respects, as in name, in power, or even in number, from that which existed before; still, it can never be contended, that the right of election which before the charter had existed in the select body, would not continue to belong to the select body created by the charter; for upon whom, after



after the corporation had accepted the charter, could it otherwise devolve?

The returns long after the charter continue to be the same as they were before it; it is not till the reign of Charles the Second that the term 'capital burgesſes' is introduced in them; for the purpose, probably, of aſcertaining more accurately the deſcription of perſons who made them; for it is to be obſerved, that the ſame ſeal is uſed after that alteration had taken place; now if that alteration had been meant to cover, or to eſtabliſh an uſurpation, is it not moſt probable that they would have changed the ſeal likewiſe, and have affixed that which is proved to belong ſolely to the mayor and capital burgeſſes? It has been ſaid, that the uſe of the public ſeal proves the return to be the act of the body at large; it is ſubmitted, that it proves no more than (what is very evident) that the return is a public act, and made on behalf of the body at large, by whomſoever the power of election is exerciſed. But the true origin of the private ſeal appears from the charter of William 3, which conſtitutes the mayor and capital burgeſſes a corporation, within the larger corporation, and not only gives them certain powers, and veſts certain lands in them, but (what is extremely material) recites their immemorial exiſtence, and their enjoyment of thoſe ſame lands. The evidence both as to the preſent occupation of the lands, and traditionally, the occupation of them by the predeceſſors of the preſent ſelect body, confirms the recital of the laſt-mentioned charter in this reſpect.

To go back to the returns which followed the period of the reſtoration, we find the 13 electors in 1674 deſcribing themſelves again, as formerly, by the name of the alderman, and "all the burgeſſes," ſo that there can be no doubt that this word was uſed to ſignify the ſelect body.

The returns in 1688-9 are anomalies. They are as irregular as the other tranſactions of thoſe times, and as the occaſion itſelf which called for them. It is probable, that the ſelect party were deſirous of obtaining the ſignature and concurrence of as many perſons as poſſible, to a tranſaction,

action, for which, or some future occasion they might be called upon to render a very heavy account. But it is remarkable, that even in these returns, the corporators at large do not describe themselves by the title burgesſes, but by the individual name of that order to which they reſpectively belong; as “aſſiſtants—landholders—commoners:” and that the return in 1691, to ſupply the place of Sir J. Long, was made by the alderman and burgesſes, “with the whole aſſent and conſent of the capital burgesſes.” The two petitions, one againſt the limited right in 1685, the other againſt the enlarged right in 1690, having met with the ſame fate, no argument can juſtly be drawn from either,

Later re-  
turns.

The returns from this time, with one exception only, are made by the capital burgesſes; and from as far back as memory, or tradition can trace, the elections have in fact been made by them; a circumſtance which of itſelf ſhould turn the ſcale in their favor, if the other ſide have not, indisputably, ſhewn another right. The agreement in 1699, only ten years after the events had taken place which are ſo much relied upon by the petitioner, ſhew that in thoſe days at leaſt, much weight was not attributed to them. The corporators at large having permitted that agreement, and the ſubſequent agreement in 1722 to paſs over in ſilence, furniſhes the ſtrongeſt evidence againſt them of the futility of their claim.

Agreements.

The committee are therefore to decide, whether the corporators at large, have ſhewn a right ſo clear and indisputable, as to ſet aſide a preſumption ariſing from long uſage, conſiſtent with all the evidence in the cauſe, with the language of the returns, and with two agreements before the Houſe of Commons. It is ſubmitted not only that they have failed in giving ſuch proof, but that even they have not furniſhed grounds for a probability, or plauſible conjecture in their favor.

Aſſiſtants.

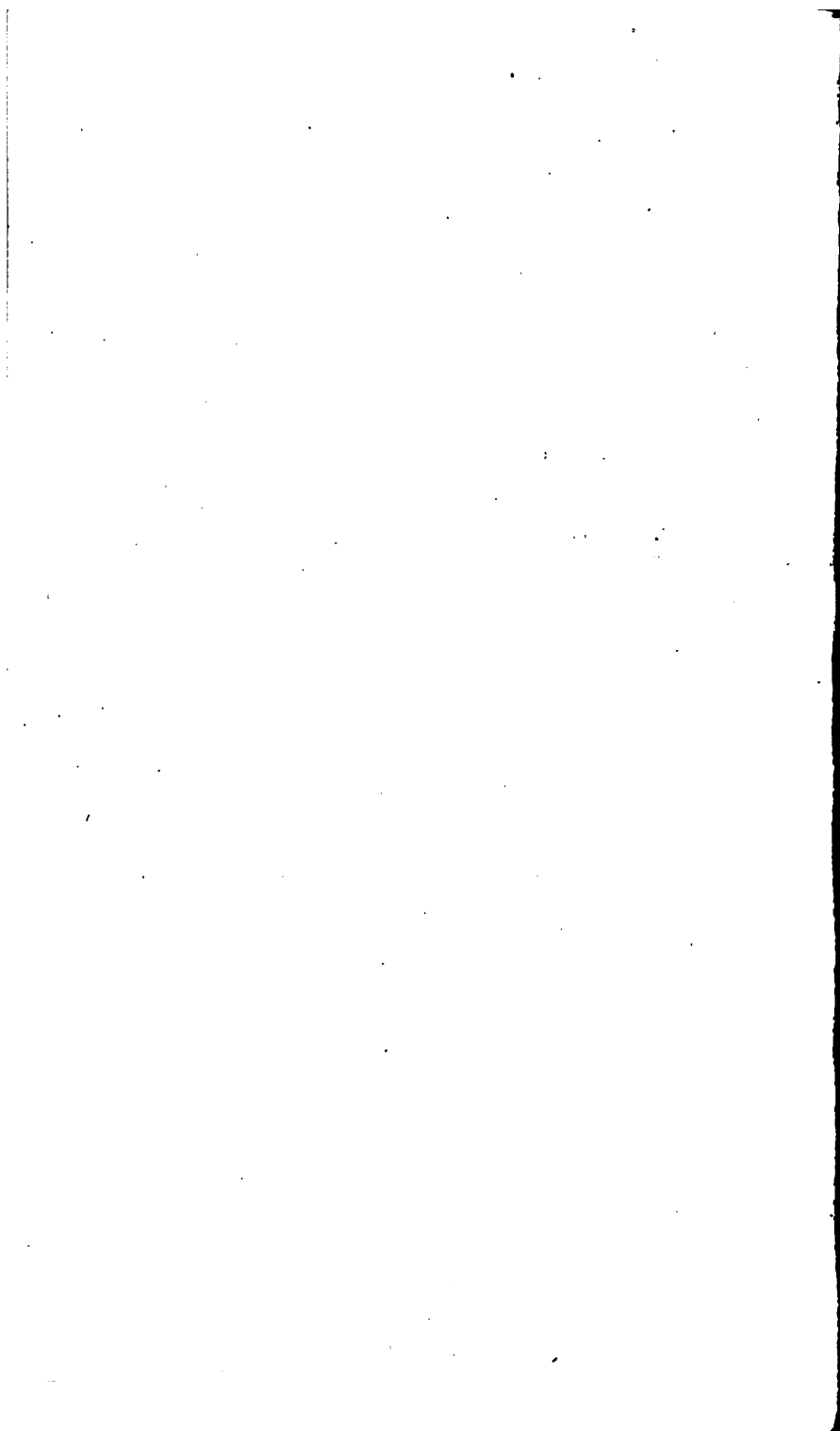
The ſame arguments drawn from uſage, from the agreements, and from the returns, exclude alſo the aſſiſtants; they are no part of the governing body, which is ſolely compoſed

composed of the alderman and the capital burgessees, according to the express provisions of the charters, and according to the practice, which has been proved to prevail from time immemorial.

The committee reported, 10 May, that the right stated by the petitioner was not the right, and that the right stated by the sitting member was the right of election in this borough; and that the sitting member was duly elected. Decision and report.

The testimony of one Hanks, a landholder, who was called as a witness by the petitioner, in support of the right stated by him, was, after argument, rejected by the committee. Incidental point. Interested witness.

For an account of the petition of appeal which was presented against the determination of the second committee, Petition of appeal.  
*see ante*, vol. 1. p. xxviii. Introd.



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## ERRATA.

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In Page xiv. Introduction, for Case of Cirencester, read Borough of C.

xxxix. l. 25. for Jan. read Jun.

312. l. 26. for eight, read twelve.

327. l. 13. for attends, read attend.

376. note P. l. 9. for sitting member, read petitioner.

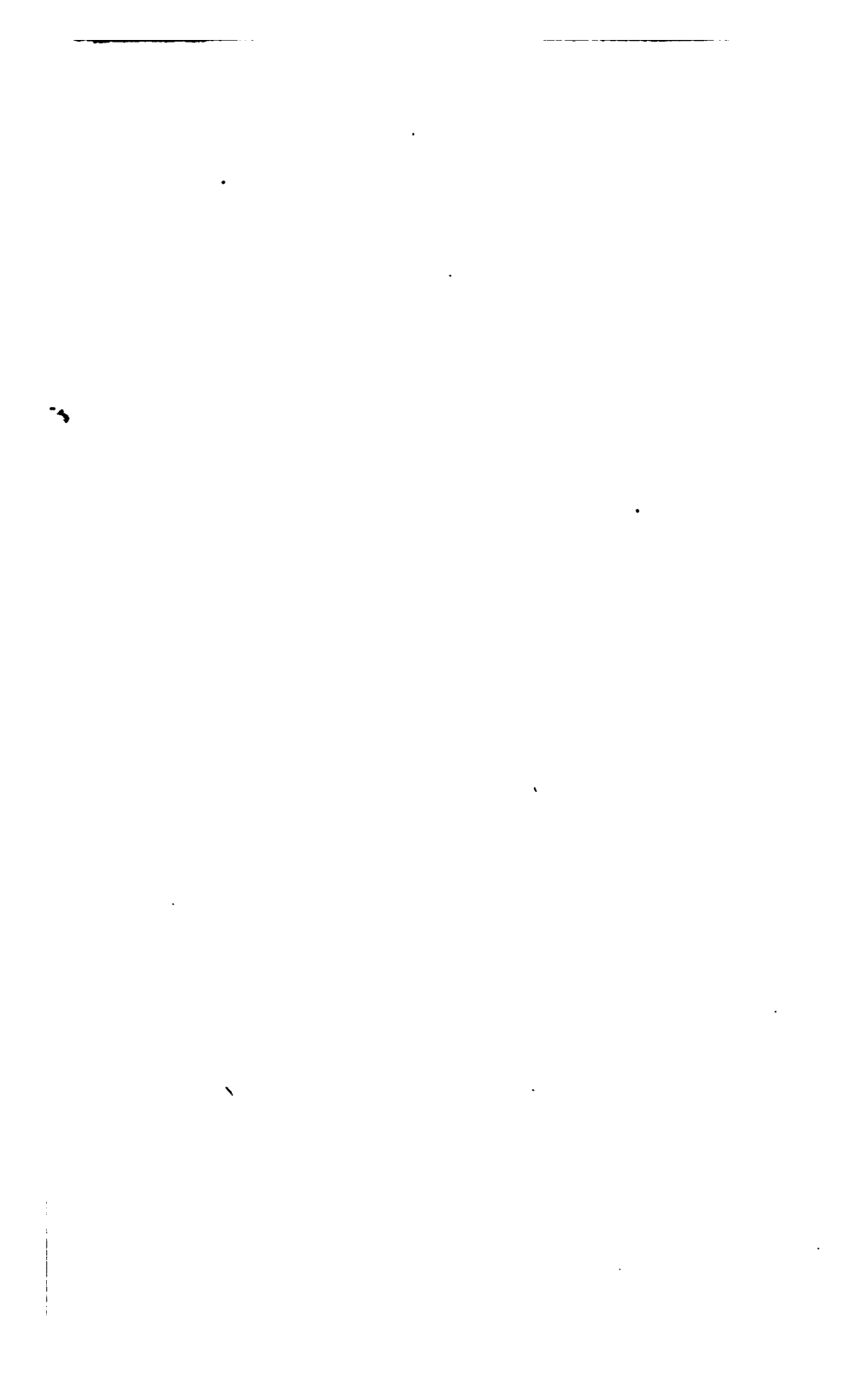
l. 15. for the same sitting member, read the same person returned upon the second election.

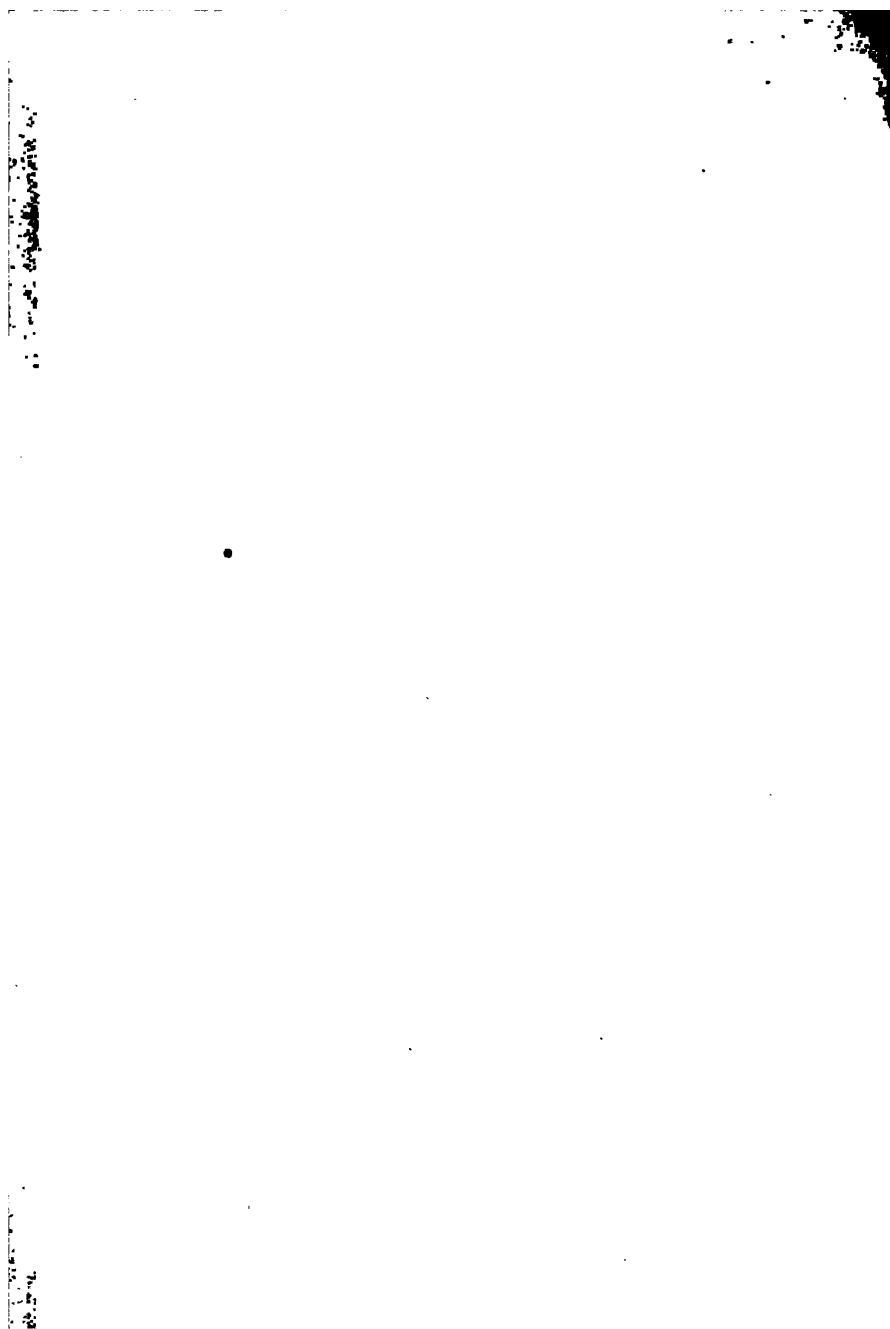
500. l. 23. for re-elected, read elected.

### VOL. II. PART I.

In Page 149. for Mr. Weatherall read Mr. Wetherall.











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